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No. 941507

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

AEROLINEAS ARGENTINAS S.A.,

Petitioner,

vs.

MARO LEATHER CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Will this Court resolve the conflict between New York State and the Second Circuit Court of Appeal and the highest courts of Great Britain and the Netherlands, in the interpretation of Warsaw Convention art. 26(2), as to whether failure to deliver one or more packages of an air shipment requires written notice of claim to the carrier within seven days of receipt of the balance of the shipment?

2. Will this Court give effect to the term "partial loss" in Cargo Tariff Rule No. 23 as filed with the Civil Aeronautics Board by air carriers, to apply it to a carrier's failure to deliver one or more packages of an air shipment, and requiring written notice of claim by the consignee to the carrier within seven days of receipt of the balance of the shipment?

3. Will this Court resolve the three-way conflict among New York State, the Fifth Circuit Court of Appeals, and the Second and Seventh Circuit Courts of Appeals and other courts within and without the United States, in the interpretation of Warsaw Convention art. 22, as to whether prejudgment interest under state law can be assessed against a carrier so as to allow the total judgment to exceed the Convention's limitation on damages based on the weight of the cargo involved?

LIST OF PARTIES

Petitioner Aerolineas Argentinas S.A. is the corporate successor to Aerolineas Argentinas Empresa del Estado, the original defendant below. A third-party claim had been interposed by Aerolineas Argentinas against Trans World Airlines, Inc., but was discontinued prior to trial. Respondent Maro Leather Co. was the original corporate plaintiff below.

The following statements are presented in accordance with Rule 29.1 of the Rules of the Supreme Court of the United States.

A majority of the stock of petitioner Aerolineas Argentinas, S.A., is owned by Iberia Lineas Aereas de España, S.A. Petitioner's only corporate subsidiary is Cielos del Sur S.A.

Petitioner believes that respondent Maro Leather Co. has no corporate parents or subsidiaries.

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IN THE

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OCTOBER TERM 1994

AEROLINEAS ARGENTINAS S.A.,

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—v.—

MARO LEATHER CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

Petitioner Aerolineas Argentinas S.A. respectfully prays that a writ of certiorari be issued to review the decision of the Appellate Term, First Department, of the Supreme Court of the State of New York, entered in these proceedings on July 19, 1994, and now final. Review is also sought of a prior nonfinal decision of the Supreme Court of the State of New York, Appellate Division, First Department in the same case entered December 20, 1988.

OPINIONS BELOW

I. Prejudgment Interest

The July 19, 1994 Order and Decision of the Appellate Term affirming the judgment of the Civil Court of the City of New York, County of New York, is reported at 161 Misc. 2d 920, 617 N.Y.S.2d 617, and is reprinted in the Appendix hereto as Appendix A.

The trial transcript of proceedings on February 25, 1991 containing the findings of fact of the trial judge supporting the judgment entered August 26, 1992, and such judgment, are not reported but are reprinted in the Appendix hereto as Appendix B.

The October 13, 1994 Order of Appellate Term denying reargument of its July 19, 1994 order or leave to appeal to the Appellate Division is not reported but is reprinted in the Appendix hereto as Appendix C. The Order of the Appellate Division denying leave to appeal from the July 19, 1994 order of Appellate Term is not reported but is reprinted in the Appendix hereto as Appendix D. Defendant's Notice of Appeal from such order to the New York Court of Appeals is reprinted in the Appendix hereto as Appendix E. The February 14, 1995 Order of the Court of Appeals dismissing such appeal is reported at 1995 N.Y. LEXIS 220 and is reprinted in the Appendix hereto as Appendix F.

II. Notice of Claim

The December 20, 1988 Order and Decision of the Appellate Division, First Department, of the Supreme Court of the State of New York reversing the October 21, 1987 order of the Appellate Term, First Department is reported at 142 A.D.2d 265, 535 N.Y.S.2d 982, and is reprinted in the Appendix hereto as Appendix G.

The Order and Decision of Appellate Term reversing the September 23, 1986 order of the Civil Court of the City of New York is not reported but is reprinted in the Appendix hereto as Appendix H.

The Order and Decision of the Civil Court of the City of New York entered September 23, 1988 is not reported but is reprinted in the Appendix hereto as Appendix I.

The March 16, 1989 Order of the Appellate Division, denying leave to appeal to the Court of Appeals of the State of New York is not reported but is reprinted in the Appendix hereto as Appendix J.

JURISDICTION

The Order of the Appellate Term, First Department affirming the judgment below was entered on December 13, 1994. This Petition for a Writ of Certiorari is filed within ninety days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (1988).

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, United States Constitution, Article VI, clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (the "Warsaw Convention"), Article 22, provides:

> Article 22 (Official French Text[1])
>
> (1) Dans le transport des personnes, la responsibilité du transporteur envers chaque voyageur est limitée à la somme de cent vingt cinq mille francs. Dans le cas où, d'aprè la loi du

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[1] "Because the only authentic text of the Warsaw Convention is in French, the French text must guide our analysis." *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 535, 111 S. Ct. 1489, 1493, 113 L. Ed. 2d 569, 577 (1991).

tribunal saisi, l'indemnité peut être fixée sous forme de rente, le capital de la rente ne peut dépasser cette limite. Toutefois par une convention spéciale avec le transporteur, le voyageur pourra fixer une limite de responsibilité plus élevée.

(2) Dans le transport de bagages enregistrés et de marchandises, la responsibilité du transporteur est limitée à la somme de deux cent cinquante francs par kilogramme, sauf déclaration spéciale d'intérêt à la livraison faite par l'expéditeur au moment de la remise du colis au transporteur et moyennant le paiement d'une taxe supplémentaire éventuelle. Dans le cas, le transporteur sera tenu de payer jusqu'à concurrence de la somme déclarée, à moins qu'il ne prouve qu'elle est supérieure à l'intérêt réel de l'expéditeur à la livraison.

(3) En ce qui concerne les objets dont le voyageur conserve la garde, la responsibilité du transporteur est limitée à cinq mille francs par voyageur.

(4) Les sommes indiquées ci-dessus sont considérées comme se rapportant au franc français constitué par soixante-cinq et demie milligrammes d'or au titre de neuf cents millièmes de fin. Elles pourront être converties dans chaque monnaie nationale en chiffres ronds.

Article 22 (American English Translation)

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the carriage of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 26 of the Warsaw Convention provides:

Article 26 (Official French Text)

(1) La réception des bagages et marchandises sans protestation par le destinataire constituera présomption, sauf preuve contraire, que les marchandises ont été livrées en bon état et conformément au titre de transport.

(2) En cas d'avarie le destinataire doit adresser au transporteur une protestation immédiatement après la découverte de l'avarie et, au plus tard, dans un délai de trois jous pour les bagages et de sept jours pour les marchandises à dater de leur réception. En cas de retard, la protestation devra être faite au plus tard dans les quatorze jours à dater du jour où le bagage ou la marchandise auront été mis à sa disposition.

(3) Toute protestation doit être faite par réserve inscrite sur le titre de transport ou part un autre écrit expédié dans le délai prévu pour cette protestation.

(4) À défaut de protestation dans les délais prévu, toutes actions contre le transporteur sont irrecevables, sauf le cas de fraude de celui-ci.

Article 26 (American English Translation)

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 33 of the Warsaw Convention provides:

Article 33 (Official French Text)

Rien dans la présente Convention ne peut empêcher un transporteur de refuser la conclusion d'un contrat de transport ou de formuler des règle-

ments qui ne sont pas en contradiction avec les dispositions de la présente Convention.

Article 33 (American English Translation)

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

Sections 5001, 5002 and 5004 of the New York Civil Practice Law and Rules (McKinney 1992) ("CPLR") provide:

§ 5001. Interest to verdict, report or decision.

(a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion

(b) Date from which computed. Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.

(c) Specifying date; computing interest. The date from which interest is to be computed shall be specified in the verdict, report or decision. If a jury is discharged without specifying the date, the court upon motion shall fix the date, except that

where the date is certain and not in dispute, the date may be fixed by the clerk of the court upon affidavit. The amount of interest shall be computed by the clerk of the court, to the date the verdict was rendered or the report or decision was made, and included in the total sum awarded.

§ 5002. Interest from verdict, report or decision to judgment.

Interest shall be recovered upon the total sum awarded, including interest to verdict, report or decision, in any action, from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment. The amount of interest shall be computed by the clerk of the court and included in the judgment.

§ 5004. Rate of Interest.

Interest shall be at the rate of nine percentum per annum, except where otherwise provided by statute.

STATEMENT OF THE CASE

I. The Facts

Maro Leather Co., a New Jersey corporation, was the consignee of an airfreight shipment of nine pallets of unfinished leather carried by Aerolineas Argentinas, the Argentine Airlines. Of the nine pallets, seven were received by Maro's trucker from Trans World Airlines, Aerolineas Argentinas's cargo handler, on February 1 and 2, 1984, but two were reported missing and were never thereafter found.

On February 10, 1984—eight days after receipt of the goods— Maro's agent filed a written notice of claim for the partial loss with the airline. The value of the missing leather was $23,024.90. The limitation on damages under Article 22 of the Warsaw Convention, based on the weight of the missing goods, was $24,000.

The airline's standard Cargo Tariff Rule No. 23, then filed with the Civil Aeronautics Board pursuant to Federal Aviation Act § 403, 49 App. U.S.C. § 1373 (1988), *repealed by* Revision of Title 49, Transportation, United States Code, Pub. L. No. 103-272 § 7(b), 108 Stat. 745, 1383) (current version codified at 49 U.S.C. § 41504), provided:

> No action shall be maintained in the case of damage to or partial loss of cargo unless a written notice, sufficiently describing the cargo concerned, the approximate date of the damage, and the details of the claim is presented to an office of Carrier within 7 days from the date of receipt thereof, in the case of delay, unless presented within 14 days from the date the cargo is placed at the disposal of the person entitled to delivery of the consignment, and in the case of loss (including non-delivery) unless presented within 120 days from the date of issue of the air waybill.

Maro's claim was denied by the airline based on failure to file a timely written notice of claim under this tariff and under Article 26 of the Warsaw Convention.

II. The Proceedings Below

Maro brought suit against the airline in New York City Civil Court in July 1985 (Complaint, Appendix K). Defendant's answer (Appendix L) raised defenses based, *inter alia*, on Articles 22 and 26 of the Warsaw Convention and on its tariffs. The First Complete Affirmative Defense alleged that "proper written notice of claim concerning [the] loss, damage, or delay [complained of] was not filed with defendant within the applicable time limit" provided in the contract of transportation, the tariffs, and the Convention. The Seventh Partial Affirmative Defense alleged that

under these same sources of law, "the liability, if any, of defendant for any loss, damage, or delay is limited."

In July 1986 plaintiff moved for partial summary judgment dismissing defendant's affirmative defense of failure to file a timely notice of claim, which was granted by decision-order of September 17, 1986 (Appendix I), the special term judge noting a "trend" toward treating shortages as "losses" rather than "partial losses" (A-33).

That determination was reversed on defendant's appeal to Appellate Term, and the action was ordered dismissed upon such defense, by order of October 21, 1987 (Appendix H), the court noting that it had recently examined the law when it had reversed one of the "trend" decisions relied on below, in which it had noted:

> Significantly, in cases of "damage to or partial loss" of cargo, unlike the case of a total loss where no shipment ever arrives (a total failure to deliver), the consignee is immediately aware of the carrier's breach and, thus, the short notice of claim requirement should not be relaxed.

Leather's Best Inc. v. Aerolineas Argentinas, 136 Misc. 2d 797, 799 (App. T. 1st Dep't 1987) (citations omitted), *rev'g* 131 Misc. 2d 426 (Civ. Ct. 1986).

The Appellate Term decision in turn was reversed and the action reinstated by the Appellate Division in December 1988 (Appendix G). After an extensive review of the existing precedents, and largely influenced by the District Court's and Second Circuit's decision in *Denby v. Seaboard World Airlines, Inc.*, 737 F.2d 172 (1984), *rev'g* 575 F. Supp. 1134 (E.D.N.Y. 1983), the Appellate Division concluded that the term "partial loss" in the Aerolineas Argentinas tariff must be limited to a shortage from a package and not extended to the loss of one or more whole packages, on the theory that (A-27):

> "loss (including non-delivery)" of an entire container or pallet must be distinguished from pilferage or theft from a sealed container. The former is readily brought to the carrier's attention, just as if the whole shipment were lost, when the consignee does not receive delivery of all goods on the manifest. The latter loss from theft, etc., however, is not readily noticeable and requires prompt notification to ensure investigation.

Leave to appeal to the New York Court of Appeals was thereafter denied by the Appellate Division[2] in March 1989 (Appendix J).

Following a bench trial, decision was issued in favor of plaintiff (Appendix B), in the course of which defendant reasserted its position that Article 22 of the Warsaw Convention limited prejudgment interest as well as the principal amount of damages, and that the Supremacy Clause required that this override local-law prejudgment-interest provisions of N.Y. CPLR 5001 & 5002.[3] The trial judge, re-

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[2]Under N.Y. CPLR 5602 (McKinney 1978), further appellate review of such a nonfinal order by the Court of Appeals may be allowed only in the discretion of the Appellate Division on motion; otherwise the issues may be reviewed by the higher court (if at all) only upon appeal from a final judgment, under *id.* 5501(a)(1).

[3]Mr. Sadowsky, for defendant, argued (A-9 to A-10):

> I ask The Court to pay judicial notice of The Warsaw Convention
>
> . . . .
>
> The purpose of The Warsaw Convention was to establish a sense of stability when The Warsaw Convention was promulgated many, many years ago. The Warsaw Convention did not address the issue of pre-judgment of interest as it felt that without having interest airlines and air carriers would be more disposed to settling their cases. The United States is a signatory to this Warsaw Convention and this is the supreme law of the land as a treaty of The United States as ratified by the congress and signed by the presi-

lying on *Eli Lilly Argentina, S.A. v. Aerolineas Argentinas*, 133 Misc. 2d 858, 508 N.Y.S.2d 865 (Civ. Ct. 1986), overruled defendant's objections and ordered that the judgment include prejudgment interest from the date of loss regardless of the Warsaw Convention limitation.

The resulting final judgment (A-12) for $41,182.40 including CPLR 5001 & 5002 interest at the CPLR 5004 rate was appealed to Appellate Term and affirmed (A-1) upon authority of *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256, 262 (5th Cir. 1984), *Mahfoud v. Eastern Airlines, Inc.*, 17 Av. Cas. (CCH) 17,714 (W.D. La. 1982), *aff'd mem.*, 729 F.2d 777 (5th Cir. 1984), *aff'd by an equally divided court*, 474 U.S. 213, 106 S. Ct. 586, 88 L. Ed. 2d 522 (1985), and *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir.), *cert. denied*, 469 U.S. 1186, 105 S. Ct. 951, 83 L. Ed. 2d 959 (1985)—a line of Fifth-Circuit cases that established discretionary prejudgment interest exceeding the Warsaw Convention weight limitation, as a matter of federal common law. The Appellate Term affirmed despite the trial judge's holding imposing interest under the mandatory terms of New York CPLR 5001, without making the find-

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dent. Whether we like it or not, state courts must abide by this precedent in the nature of the statute, in the nature of the *Deere* case and *O'Rourke* and other authorities which my opposing counsel has cited.

. . . .

I would ask The Court to not follow this *Eli Lily* case as I do not think, and I say this as an officer of the court, that it is good law. It has not been followed by any single state court in a Second Circuit or cited with approval. I think it is vulnerable to attack. Perhaps in today's mode of transportation the Warsaw Convention should be modified or changed in some way, but that scenario is not presented to this court. We can only go by what The Warsaw Convention says.

There is no indication that interest is applicable and I would advise that interest should be denied.

ings required by *Domangue* to support the court's exercise of discretion.

The Appellate Term thereafter denied defendant's motion for leave to appeal to the Appellate Division (Appendix C), as did the Appellate Division (Appendix D). Although defendant filed a notice of appeal to the Court of Appeals of New York (Appendix E), upon the premise that a construction of the Supremacy Clause of the U.S. Constitution was directly involved, the Court of Appeals on its own motion dismissed the appeal for lack of jurisdiction (Appendix F), evidently upon the theory that the decision below represented judicial construction of the treaty rather than a conflict between the terms of the treaty and the state prejudgment-interest statute, which would directly implicate the Supremacy Clause.[4] The dismissal of the appeal made final the decision of Appellate Term of July 19, 1994 as well as the Appellate Division decision of December 20, 1988.

The federal claims now pursued were thus raised at the earliest stage of the pleadings and have been continually reasserted throughout the proceedings below.

REASONS FOR GRANTING THE WRIT

I. There Is Conflict Among State and Federal Courts and Courts Abroad as to the Rule Requiring a Notice of Claim Under the Warsaw Convention for Partial Loss of Air Cargo

Article 26 of the Warsaw Convention requires written notice of claim as a condition precedent to suit based on "damage" ("*avarie*") to air cargo, but whether this term

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[4]CPLR 5601(b)(1) provides that an appeal lies as of right to the Court of Appeals "from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States." Clearly the Appellate Division disposition was final. No written decision was issued explaining the rationale for the Court of Appeals dismissal; the explanation here given was the argument made by plaintiff by letter-submission

should be interpreted to require such notice where part of the goods never arrives has been subject to conflicting rulings.

The definitive analysis of this question was undertaken in the British decision of *Fothergill v. Monarch Airlines Ltd.*, [1981] A.C. 251, 274-75 (H.L. 1980), a case where a passenger timely complained of damage to his suitcase but not of partial loss of its contents. Lord Wilburforce noted that the term "*avarie*", like "damage", was susceptible to a narrow interpretation—physical damage alone—or a broader sense which would include "physical damage, or loss, including partial loss". He noted that the latter interpretation would better accord with the purposes of Article 26, and as well accorded with French, Argentine, Belgian, and Swiss jurisprudence, and held the partial-loss claim untimely.

In Great Britain, independent of the *Fothergill* case, Parliament enacted the Warsaw Convention into positive law through the Carriage by Air Act 1961, 9 & 10 Eliz. 2, ch. 27, *amended by* Carriage by Air and Road Act 1979, 1979 ch. 28, to which the Convention as amended is annexed as Schedules. This latter amendment specifically provided, as regards art. 26:

> In Article 26(2) the references to damage shall be construed as including loss of part of the baggage or cargo in question and the reference to the receipt of the baggage or cargo shall, in relation to loss of part of it, be construed as receipt of the remainder of it.

Carriage by Air and Road Act 1979, 1979 ch. 28, § 2. Thus in Great Britain the *Fothergill* holding has been broadly implemented for all cases of partial loss.

An identical result was obtained by the supreme court of the Netherlands in *Affretair (Compagnie Gabonaise d'Af-*

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during the court's *sua sponte* review of the jurisdictional issue.

frètement Aérien) v. VOB (Versicherungsanstalt der Österreichischen Bundesländer Versicherungsaktiengesellschaft), RW 1982,50 (HR 1982) (reprinted in 7 J. AIR L. 173 (1982)), holding that where three cartons from a consignment of twenty were lost, this constituted "damage" within the meaning of art. 26 of the Convention. This decision was described in an accompanying commentary as "more than an affirmation of the ruling of the House of Lords," in *Fothergill*, since it applies to the total loss of a discrete number of packages rather than shortage from one or more packages. Note, Supreme Court of the Netherlands: Affretair v. VOB or Fothergill's Dutch Treatment: decision of 12 February 1982, 7 J. AIR L. at 176.

In the case of losses of cartons from a containerized shipment, *Fothergill* was followed in the U.S. by *Denby v. Seaboard World Airlines, Inc.*, 575 F. Supp. 1134, 1138-44 (E.D.N.Y. 1983) (Weinstein, C.J.), but this was reversed by the Second Circuit, 737 F.2d 172, 179-80, 182-83 (1984), because the factual record was unclear as to whether the shipment should be treated as of a single container or of multiple cartons, assuming but not deciding that this might affect the result.[5] The Second Circuit's sole authority for thinking that a different result might be had if individual cartons were lost was *Dalton v. Delta Airlines, Inc.*, 570 F.2d 1244 (5th Cir. 1978), *rev'g* 14 Av. Cas. (CCH) 17,219 (S.D. Fla. 1974). *Dalton* held that where racing dogs arrived dead at the airport of destination, they were "destroyed" goods rather than "damaged" goods within the meaning of art. 26(1), and thus no notice was required.

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[5]Although the case was remanded, it was settled prior to trial, and no further findings were made. It may be questioned, however, whether the distinction proposed by the Second Circuit might well be "incompatible with the language of the Convention." *Chan v. Korean Airlines, Ltd.*, 490 U.S. 122, 130, 109 S. Ct. 1676, 1681, 104 L. Ed. 2d 113, 124 (1989): If the meaning of *avarie* includes partial losses, why should it include some partial losses but not others?

In the wake of the Second Circuit's *Denby* decision, a multiplicity of results have developed within the United States, with most courts not bothering to examine the language of the treaty or its analyses in *Fothergill*.

One line of cases, e.g., *Butler's Shoe Corp. v. Pan American World Airways*, 514 F.2d 1283, 1285 n. 2 (5th Cir. 1975), draws the obvious conclusion that where no part of the shipment is delivered at all, no notice is required under art. 26. This is logically consistent with the text of the treaty, since there is no "receipt" of goods from which to measure the seven-day period.

Another line of cases holds that any kind of partial loss, as by pilferage, is "loss" rather than "damage" within the meaning of art. 26, and thus no notice is required: *St. Paul Insurance Co. v. Venezuelan International Airways, Inc.*, 807 F.2d 1543, 1546 (11th Cir. 1987) (loss of 24.5% by weight of tractor parts in two shipments; art. 26 held not to apply); *cf. Schwimmer v. Air France*, 87 Misc. 2d 147, 149, 384 N.Y.S.2d 658, 659 (Civ. Ct. 1976) (art. 26 notice held required for 4 damaged cases of personal goods but not for 7 cases not delivered; "Damage is damage and loss is loss").

The *Dalton* line of cases has since been limited to instances of dead livestock, rather than other types of "destruction". *Compare Hughes-Gibb & Co. v. Flying Tiger Line, Inc.*, 504 F. Supp. 1239 (N.D. Ill. 1981) (*Dalton* rule applied to breeding swine dead on arrival but not to those dying after delivery) *with Highlands Insurance Co. v. Trinidad and Tobago (BWIA International) Airways Corp.*, 739 F.2d 536 (11th Cir. 1984) (electronic parts dropped 18 ft. to floor not "destroyed" within meaning of *Dalton*) *and Maschinenfabrik Kern, A.G. v. Northwest Airlines, Inc.*, 562 F. Supp. 232 (N.D. Ill. 1983) (notice held necessary for "total destruction" of duplicating machines).

A further split has developed between cases that make a distinction between partial losses that involve shortage of contents from one or more packages and those that involve

one or more complete packages, as the case here below. Since these almost always involve consideration of tariff provisions, they will be discussed below.

To sum up, there is no uniformity of interpretation of art. 26 of the Warsaw Convention in this country as applied to the broader sense of "damage"("*avarie*") recognized in *Fothergill* as the best interpretation of these critical terms and implemented in Great Britain at least by legislative enactment. In a situation where international uniformity is paramount, the need for a consistent standard is evident.

II. There Is Conflict Among State and Federal Courts and Courts Abroad as to the Rule Requiring a Notice of Claim Under Tariffs for Partial Loss of Air Cargo

Article 33 of the Warsaw Convention allows air carriers to promulgate regulations covering situations not covered by the Convention provided they do not "conflict with" the Convention. Cargo Tariff Rule 23(b) adds two new categories to the Convention's two categories of "damage" and "delay" in art. 26—that of "partial loss" (requiring, as for damage, notice within seven days of receipt of the cargo) and of "loss (including non-delivery)" (requiring notice within 120 days of the issuance of the air waybill). The obvious intent of this tariff is to clarify the treatment of partial losses of baggage or cargo, and to fix a notice provision for the *Butler's Shoe* situation where no delivery ever takes place. This rule has been upheld as a permissible regulation under art. 33. *E.g. Famolare v. Seaboard World Airlines*, 15 Av. Cas. (CCH) 17,287 (N.Y. Sup. Ct. 1978).

The term "partial loss" has traditionally been interpreted under maritime law to mean any loss that is not an actual or constructive total loss of an entire cargo, and specifically including the total loss of a part of a shipment. *See, e.g., American Insurance Co. v. Griswold*, 14 Wend.

399, 472 (N.Y. 1835) (giving example of one hogshead of sugar washed overboard out of a shipment of twenty).

Some earlier aviation cases interpreted this tariff langage to apply to the total loss of one or more packages from a shipment, *e.g.*, *Travelers Indemnity Co. v. Alia Airlines*, 18 Av. Cas. (CCH) 17,687 (N.Y.C. Civ. Ct. 1984), *aff'd without opinion*, No. 84-630 (App. T. 1st Dep't April 2, 1985), as well as where part of the contents of a package were missing, *e.g. Hartford Fire Insurance Co. v. Aerolineas Argentinas*, 16 Av. Cas. (CCH) 17,940 (N.Y. App. T. 1981). The rule was, as the Appellate Term noted below in the present case, "the loss of one of a number of pallets constitutes a partial loss of the total shipment, not a total loss of part of the shipment, within the meaning of defendant's tariff" (A-31).

The Second Circuit's *Denby* decision, however, again introduced a note of confusion. Even though tariff interpretation of Rule 23(B) was not there involved,[6] subsequent courts used *Denby* as authority for holding that "partial loss" could be applied only in the *Hartford Fire Insurance* situation. Both *Siemens Corp. v. KLM Royal Dutch Airlines*, 19 Av. Cas. (CCH) 18,502 (N.Y. Civ. Ct. 1986), and the Appellate Division below (A-25 to A-28) relied on *Denby* to hold that partial loss of a discrete number of packages was not a "partial loss" under the tariff but a "loss (including non-delivery)". Such holdings were buttressed by the observation that missing packages should be obvious to the carrier (while missing contents from a package might not be), even though earlier cases firmly established that a carrier's actual knowledge of damage does not excuse a consignee's noncompliance with a tariff notice requirement, *e.g.*, *Stud v. Trans International Airlines*, 727 F.2d 880, 883 (9th Cir. 1984); *Amazon Coffee Co. v. Trans World Airlines, Inc.*, 18 Av. Cas. (CCH) 17,264, 17,264 (N.Y.

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[6]Seaboard's filed tariff was ambiguous as to whether Rule 23 applied to it, allegedly due to a clerical error. This was a factual issue to be explored on remand. 737 F.2d at 186-87.

Sup. Ct. 1983) (citing non-aviation cases), *modified on other grounds,* 111 A.D.2d 776, 490 N.Y.S.2d 523 (1985).

The purpose of a notice requirement, as noted by Lord Wilburforce in *Fothergill*, is "reasonably clear":

> It is: (1) to enable the airline to check the nature of the "damage"; (2) to enable it to make inquiries how and when it occurred; (3) to enable it to assess its possible liability, to make provision in its accounts and if necessary to claim on its insurers; (4) to enable it to ensure that relevant documents (for example, the baggage checks or passenger ticket, or the air waybill) are retained until the issue of liability is disposed of.

[1981] A.C. at 272 (quoted with approval in *Denby*, 737 F.2d at 177 n. 7). *See also Stud v. Trans International Airlines*, 727 F.2d at 883-84 ("One reason for the written notice requirement is to avoid endless speculation about who knew what and when they allegedly knew it."). None of these purposes is served by excusing a consignee from a short notice requirement by giving an artificial construction to the term "partial loss". This is especially the case where, as here, actual delivery to the consignee may be made by a contracted cargo handling company rather than the carrier itself. Rather, as a commercial reality, it is the consignee who is in the best position, if not the only position, to examine its shipment to determine whether it actually received all it was supposed to and in the condition it was supposed to be in. If not, it can best work to correct the situation or obtain recovery against the responsible party by filing its notice to the carrier and starting the claims process.

The existing multiplicity of interpretations serves no commercial purpose and, by doing violence to the plain language of the tariff provisions, only invites confusion. Only this Court can resolve this mishmash by accepting this case for review.

III. There is a Clear Three-Way Conflict Among Two Federal Circuits and New York State Courts as to Awarding Prejudgment Interest in Excess of the Warsaw Convention Weight Limitation

There is a conflict among federal courts and New York state courts as to the question of prejudgment interest in Warsaw Convention cases where the damages with interest would exceed the amount of liability prescribed under art. 22 of the Convention. This is a question unaddressed in this Court's consideration of *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 104 S. Ct. 1776, 80 L. Ed. 2d 273 (1984), and presented to this Court but likewise unresolved by *Eastern Airlines, Inc. v. Mahfoud*, 474 U.S. 213, 106 S. Ct. 586, 88 L. Ed. 2d 522 (1985), *aff'g by an equally divided court* 729 F.2d 777 (5th Cir. 1984), *mem. aff'g* 17 Av. Cas. (CCH) 17,714 (W.D. La. 1982). The question has received three different answers to date.

One view takes the plain wording of the Convention, informed by the drafters' primary intentions, as controlling. *O'Rourke v. Eastern Air Lines, Inc.*, 730 F.2d 842 (2d Cir. 1984), was a passenger death case governed by the Convention as modified by the Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement C.A.B. No. 18900, approved by order E-23680, May 13, 1966 (Docket 17325), 31 Fed. Reg. 7302 (1966), commonly known as the Montreal Agreement, a private agreement among airlines and the Civil Aeronautics Board which raised the passenger-injury liability limit to $75,000, inclusive of legal fees and costs, while eliminating "fault" as an issue to be litigated. Since the Montreal Agreement was silent as to prejudgment interest, the administrator of a deceased passenger sought prejudgment interest in addition to the $75,000 maximum award. The Second Circuit focused on the "liability of the carrier . . . shall be limited" language of art. 22 of the Convention, which is likewise silent as to interest, as well as fees and costs. The

court recognized the prime underlying purposes of the Convention was to limit air carriers' liability for damages to a fixed and definite sum and to provide a fixed and uniform body of international law to govern such determinations. While it noted that the objects of the Montreal Agreement were to increase compensation to passengers above the original Warsaw limit and to speed the resolution of claims, it could find no intention by the parties to that Agreement to modify the original Warsaw principles. 730 F.2d at 852. Although the Convention provided for application of local law in some of its articles, there was no such provision in art. 22; accordingly, interest above the revised $75,000 limit was denied. *Id.* at 853.

While *O'Rourke* was pending, the Fifth Circuit decided the issue differently. *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984), also a wrongful-death case, arose out of the same airplane crash as did *O'Rourke*. Concentrating on the speedy-compensation objectives of the Montreal Agreement in the context of a no-fault claim against an airline where there was no question that the $75,000 damage limit could be proved, the court held that equitable principles could support an award to a passenger of prejudgment interest "under the Warsaw/Montreal body of law". *Id.* at 262-63. In considering such a discretionary award, a judge would be bound neither by traditional common-law restrictions nor by state statutes, but should take into account such equitable factors as the span of time from the tort to the judgment, responsibilities for any delay, and achieving the goal of facilitating the disposition of bona fide claims. *Id.* at 262, 264.

The *O'Rourke* court acknowledged the *Domangue* decision in a footnote, 730 F.2d at 853-54 n.20, offering three reasons why it would not follow it: (1) establishing different rules in different countries (and the *O'Rourke* plaintiff sought interest under a state statute) would defeat the Warsaw Convention's purpose of international uniformity, (2) the speedy-disposition objective was not

supported by the history of the Montreal Agreement,[7] and (3) the *Domangue* rationale had no application in a case where, as in *O'Rourke*, full liability was not conceded by the defendant.

The Fifth Circuit has alone persisted in its *Domangue* holding, following it in *Mahfoud v. Eastern Airlines, Inc.*, 729 F.2d 777 (5th Cir. 1984, *mem. aff'g* 17 Av. Cas. (CCH) 17,714 (W.D. La. 1982), *aff'd by an equally divided court*, 474 U.S. 213, 106 S. Ct. 586, 88 L. Ed. 2d 522 (1985), and even extending it without comment to a cargo case—a claim wholly outside the subject-matter of the Montreal Agreement, *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir.), *cert. denied*, 469 U.S. 1186, 105 S. Ct. 951, 83 L. Ed. 2d 959 (1985).

The Second Circuit has meanwhile extended the *O'Rourke* holding to cargo cases, *Exim Industries, Inc. v. Pan American World Airways, Inc.*, 754 F.2d 106 (2d Cir. 1985), and later cases have clarified that prejudgment interest would be freely available in Warsaw cases where the damage limitation was otherwise unavailable to the carrier, *e.g., Hollie v. Korean Air Lines Co.*, 834 F. Supp. 65 (S.D.N.Y. 1993) (using an average of Treasury Bill rates to determine interest).

Moreover, all other courts which have considered the question, other than New York state courts, have, upon considering both lines of decision, followed the Second Circuit: *e.g., Deere & Co., v. Deutsche Lufthansa Aktiengesellschaft*, 855 F.2d 385 (7th Cir. 1988); *Corio Brothers Investment Corp. v. Fast Air Carrier, S.A.*, 24 Av. Cas. (CCH) 17,719 (S.D. Fla. 1993); *The Limited Stores, Inc. v. Pan American World Airways, Inc.*, 65 Ohio St. 3d 66, 600

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[7]Moreover, as noted by this Court in *Air France v. Saks*, 470 U.S. 392, 407, 105 S. Ct. 1338, 1346, 84 L. Ed. 2d 289, 301 (1985), the parties to the Montreal Agreement waived defenses otherwise available under art. 20(1) of the Convention, but "they did not waive other provisions in the Convention that operate to qualify liability."

N.E.2d 1027 (1992). The Second Circuit rule is likewise the holding of decisions abroad, in England, *Swiss Bank Corp. v. Brink's M.A.T. Ltd.*, [1986] 1 Q.B. 853, and Australia, *S.S. Pharmaceutical Co. v. Qantas Airways Ltd.*, [1989] 1 Lloyd's Rep. 319 (Sup. Ct. N.S.W., Austl., Comm. Div. 1988), *aff'd*, [1991] 1 Lloyd's Rep. 288, 297 (Austl. Ct. App. 1990). No court outside the Fifth Circuit has followed *Domangue* in allowing discretionary interest beyond the Warsaw weight limitation.

The trial court and Appellate Term below, and one other New York state lower court, have claimed to follow *Domangue*, but have held otherwise and established a third line of decisions. *Eli Lilly Argentina, S.A. v. Aerolineas Argentinas*, 133 Misc. 2d 858, 861, 508 N.Y.S.2d 865, 867 (Civ. Ct. 1986), was an action for damage to chemical drums during loading. The parties stipulated that the amount of loss was the Warsaw Convention weight limitation of $18,360; the sole question presented for decision was whether plaintiff was entitled to prejudgment interest in excess of this amount. The court noted *Domangue*'s recognition that prejudgment interest constitutes payment for the use of money to which a plaintiff may be entitled, but ignored its holding that the Convention preempts state law on prejudgment interest, declaring: "The law of the State of New York is in accord. CPLR 5001 provides for interest in an action for property loss or damage from the earliest ascertainable date upon which the cause of action arose." *Id.* at 861, 508 N.Y.S.2d at 866-67. Without citation of further Warsaw authority, the court concluded: "Article 28 of the Warsaw Convention[8] may be interpreted to allow the

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[8]Warsaw Convention art. 28(1) provides for venue in Warsaw cases; art. 28(2) states: "Questions of procedure shall be governed by the law of the court to which the case is submitted." 49 Stat. at 3020-21. The *O'Rourke* court noted this as one of the five instances in the Convention where application of the law of the forum was permitted—none of which, it noted, allowed for prejudgment interest under local law. 730 F.2d at 853.

law of the forum on prejudgment interest," *id.*, and awarded prejudgment interest under CPLR 5001.

The decision of the trial judge in the instant case was expressly premised on the "decision and the reasoning of" *Eli Lilly* and awarded prejudgment interest—not according to the *discretionary* equitable principles espoused by the *Domangue* court—but under the *mandatory* provisions of CPLR 5001 (A-11). The Appellate Term affirmance did likewise (A-2). This is clearly a third road, awarding interest under state law in excess of a limitation unambiguously set forth in the treaty, justified under the rubric of treaty interpretation.

Thus again, under a multilateral treaty whose goal was internaional uniformity of law, a situation has developed where in one country alone multiple disparate rules are maintained. International air carriers face widely differing amounts of judgments on identical claims, depending upon venue of suit, depending on local interest rates, and even depending on the mood of the judge to whom the case is assigned, under a treaty whose original purpose was to establish a uniform rule of liability. Commercial realities, and the fulfillment of the expectations of the international community, require a more uniform rule, which this Court alone can provide.

CONCLUSION

As recently as this Court's decision in *Eastern Airlines, Inc. v. Floyd*, 499 U.S. at 546, 111 S. Ct. at 1499, 113 L. Ed. 2d at 584, it recognized that the original parties to the Warsaw Convention "were more concerned with protecting air carriers and fostering a new industry than providing full recovery to injured passengers" or consignees of cargo, and that the Convention must be construed to effect such purposes. Although changes in domestic law since 1929 increasingly favor consumers of goods and services, nevertheless the Convention, as "the supreme Law of the Land," is entitled to construction and recognition of its plain language in the light of its originally intended purposes. Commercially reasonable tariffs promulgated consistently with the Convention should be accorded like construction.

Petitioner respectfully submits that those purposes have *not* been recognized by the decisions of the New York state courts below, and moreover that such decisions are in stark conflict (a) in the case of partial losses of air cargo, with Judge Weinstein's decision in *Denby* and the internationally consistent rule of *Fothergill*, the British Carriage by Air and Road Act, and *Affretair*, and (b) in the case of prejudgment interest, with each of the *O'Rourke* and the *Domangue* lines of authority.

With the current multiplicity of rulings, international air carriers cannot predict the amount of interst on a baggage or cargo claim, nor can consignees predict whether they need to file a notice of claim for short shipments, since the answers to these issues largely depend on the forum where the claim may be heard.

Further, the judicial construction both of a multilateral treaty to which the United States is a party and of air tariffs filed with a federal agency, are peculiarly federal questions upon which a uniform national rule is needed, and which only this Court can provide.

For all the foregoing reasons, the present petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 13, 1995

APPENDIX A

N.Y. County Clerk's # 570336/93 July 19, 1994
APPELLATE TERM OF THE SUPREME COURT,
FIRST DEPARTMENT

SEPTEMBER 1993

PRESENT: HON. EDITH MILLER, J.P.
HON. WILLIAM P. McCOOE
HON. KRISTIN BOOTH GLEN
Justices.

MARO LEATHER CO.,
Plaintiff-Respondent,
- against -
AEROLINEAS ARGENTINAS, #93-257
Defendant-Appellant and
Third-Party Plaintiff,
- against -
TRANS WORLD AIRLINES, INC.,
Third-Party Defendant

Defendant Aerolineas Argentinas appeals from a judgment of the Civil Court, New York County, entered August 26, 1992 after a nonjury trial (Jane Solomon, J.) awarding plaintiff the sum of $41,182.40 upon a recovery of $23,024.90.

PER CURIAM:

Judgment entered August 26, 1992 (Jane Solomon, J.) affirmed, with $25 costs.

Plaintiff Maro Leather Co., a leather importer/finisher, commenced this breach of contract action against defendant airline in July 1985 to recover damages for the loss of two pallets of unfinished leather goods in February 1984 shipped from Argentina to New York. Following a reversal of our prior grant of summary judgment to defendant and reinstatement of the complaint (Maro Leather Co. v. Aerolineas Argentinas, 142 A.D.2d 265, rearg. denied ___ AD2d ___, N.Y.L.J., March 20, 1989, at 22, col. 1), and the completion of certain discovery by defendant

against a nonparty truck carrier concerning the origin of the cargo loss, the trial court awarded plaintiff a total award of $41,182.40, inclusive of prejudgment interest of $17,790 from February 2, 1984, the date of the loss. The principal amount of plaintiff's recovery was $23,024.90 or slightly less than the Warsaw Convention liability limitation of $24,000 (1200 kilograms at $20 per kilogram) [Article 22 of the Convention] [49 Stat. 3000, TS No. 876, reprinted at 49 USCA § 1502].

In awarding prejudgment interest in excess of the Warsaw Convention's total damages limitation, the trial court relied upon the reasoning of Eli Lilly Argentina, S.A. v. Aerolineas Argentinas, 133 Misc.2d 858, emphasizing the compensatory nature of prejudgment interest under New York law (see, CPLR 5001) and the goal of speedy resolution of cargo loss claims. We affirm.

We adopt the Fifth Circuit Court of Appeals' position that prejudgment interest, while not specifically mentioned in the Warsaw Convention, is allowable in a cargo loss case since it speeds settlement and recovery and fully compensates the successful plaintiff for the time value of its money that defendant enjoyed from the delay in payment (Domangue v. Eastern Air Lines, 722 F.2d 256, 263-264 [5th Cir. 1984] [allowing prejudgment interest under the Warsaw Convention on a wrongful death claim]; Boehringer-Mannheim Diagnostics v. Pan Am. World Airways, 737 F.2d 456, 460 [5th Cir. 1984], cert. denied and appeal dismissed 469 U.S. 1186 [1985] [citing *Domangue* in upholding the award of prejudgment interest under the Warsaw Convention in a cargo damage case]; see also, Mahfoud v. Eastern Air Lines, 17 Av. Cas. (CCH) 17,714 [W.D. La. 1984], affd without opinion, 729 F.2d 777 [5th Cir. 1984]. affd by an equally divided court, 474 U.S. 213 [1985] [affirming a grant of prejudgment interest under the Warsaw Convention]; Eli Lilly Argentina, S.A. v. Aerolineas Argentinas, supra, [citing *Domanque* in awarding prejudgment interest under the Convention in a cargo damage case]; 2 Sorkin, Goods in Transit, § 11.07[4][c]).

Here, given the length of time between the cargo loss (1984) and the judgment (1992) [eight years] and the act that defendant's conduct contributed to the delay in resolving this litigation

[Record at 677-678, 1219] (see, Domangue v. Eastern Air Lines, supra, at 264), the award of prejudgment interest in plaintiff's favor was appropriate.

In affirming the determination of the trial court, we decline to follow the contrary holdings of both the Second Circuit in O'Rourke v. Eastern Air Lines, 730 F.2d 842, 851-853 [2d Cir. 1984] [upholding District Court's refusal to award prejudgment interest above aggregate damages limitation under Warsaw Convention on a wrongful death claim stemming from the same disaster that generated the *Domangue* action] and Exim Indus. v. Pan Am. World Airways, 754 F.2d 106, 109 [2d Cir. 1985] [citing *O'Rourke* in upholding a refusal to award prejudgment interest under the Convention in a cargo loss case] and the Seventh Circuit in Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft, 855 F.2d 385 [7th Cir. 1988] [citing *O'Rourke* in reversing an award of prejudgment interest above the aggregate damages limitation of the Convention in a cargo damage case]). We note that our court, as a State court, is not bound under the doctrine of stara decisis by the opinion of these Federal courts (see generally, Pitt v. City of New York, 94 A.D.2d 202, 207, affd 63 N.Y.2d 815).

Turning to defendant's remaining contentions, defendant's August 1989 pre-trial motion to dismiss the complaint based upon the lack of capacity of plaintiff (a New Jersey corporation) to maintain this action under BCL § 1312(1) was properly denied by the court below, following the Appellate Division's reinstatement of the complaint under the governing tariff. A defendant relying upon BCL § 1312(1) has the burden of proving that the foreign corporate plaintiff was "doing business" in New York without authority (Great White Whale Adv. v. First Festival Prods., 81 A.D.2d 704, 706). Specifically, defendant must prove that plaintiff's business activities here were "so systematic and regular as to manifest continuity of activity in the jurisdiction" (Construction Specialties v. Hartford Ins. Co., 97 A.D.2d 808). A determination of whether regular and systematic intrastate activity has been undertaken must inquire into "the type of business activities being conducted" (Van Arx, AG. v.

Breitenstein, 52 A.D.2d 1049, 1050, aff'd 41 N.Y.2d 958). Where a foreign corporation's activities within New York are "merely incidental to its business in interstate and international commerce," BCL § 1312(a) is not applicable (Alicanto, S.A. v. Woolverton, 129 A.D.2d 601, 603; see also, Storwal Intl. v. Thom Rock Realty Co., 784 F.Supp. 1141, 1144 [S.D.N.Y. 1992]).

Significantly, the "doing business" standard under BCL § 1312(a) requires a greater amount of local activity by a foreign corporation than the "doing business" standard applicable under New York's long-arm statute [CPLR 302] relating to personal jurisdiction (Colonial Mtge. Co. v. First Fed. Sav. & Loan Assn., 57 A.D.2d 1046, 1047; Annotation, "Closed Door" Statutes, 88 A.L.R. 4th 466, 485, § 6[a]. In the context of BCL § 1312(a), a foreign corporation bringing suit in New York is presumed to be doing business in its state of incorporation and not in New York (Alicanto, S.A. v. Woolverton, supra, at 602; Great White Whale Adv. v. First Festival Prods., supra, at 706). The statute is a "revenue measure, designed to place foreign corporations on an equal footing with domestic [corporations]" (Siegel, N.Y. Prac., § 30 at 32 [2d ed.]). Its purpose is not to enable a defendant to avoid contractual obligations (Van Arx, AG. v. Breitenstein, 41 N.Y.2d at 960). Noncompliance with the registration and taxation requirements of BCL § 1312(a) does not raise a jurisdictional bar and is curable during the pendency of the action (Intermar Overseas v. Argocean, S.A., 117 A.D.2d 492, 497).

On this record, defendant failed to meet its burden of proving that at the time of the 1984 contract of international air carriage, plaintiff conducted systematic and regular business activities here essential to its corporate business. Notably, the mere solicitation of sales in New York and placement of orders do not constitute doing business in the State within the meaning of BCL § 1312[a] (Sirois Leather v. Lea-Suede Corp., 44 A.D.2d 815; Librairie Hachette, S.A. v. Paris Book Center, 62 Misc.2d 873, 875; 14 N.Y. Jur.2d, Business Relationships, §§ 470, 479). The cases relied upon by defendant (see, United Arab Shipping Co.

v. Al-Hashim, 176 A.D.2d 569, appeal dismissed 79 N.Y.2d 1038, appeal dismissed 80 N.Y.2d 923; Parkwood Furniture Co. v. OK Furniture Co., 76 A.D.2d 905; Conklin Limestone Co. v. Linden, 22 A.D.2d 63; Paper Mfrs. Co. v. Ris Paper Co., 86 Misc.2d 95) involve foreign corporations whose intrastate activities were of a "regular, systematic, extensive and continuous nature," not proven in this case.

Nor did the court below abuse its discretion in rejecting defendant's dilatory efforts to conduct discovery on this issue on the eve of trial (see generally, Dunsmore v. Paprin, 114 AD2d 836). Defendant offered no reasonable excuse nor special circumstances warranting that relief. This action had been pending for several months following reinstatement of the action and plaintiff's subsequent response to a CPLR 3123 notice to admit that it was "doing business" in New Jersey as a leather importer (Record at 277). Nevertheless, defendant did not seek to depose plaintiff concerning the nature and level of plaintiff's business activity here (see generally, Fine Arts Enters., N.V. v. Levy, 149 A.D.2d 795, 796). Although defendant ultimately completed its own investigation in October 1989, defendant failed to ascertain such pivotal factors as the volume of plaintiff's sales within New York, both in number and dollar amounts (Reese v. Harper Surface Finishing Sys., 129 AD2d 159, 165; Peter Matthews, Ltd. v. Robert Mabey, Inc., 117 AD2d 943, 944; Parkwood Furniture Co. v. OK Furniture Co., supra). We further note that soon after plaintiff's filing of a notice of trial and certificate of readiness, defendant had indicated in May 1989 that it had no desire for further discovery, other than to depose plaintiff's New Jersey truck carrier as to the circumstances of the delivery of the airport shipment (Record at R139).

This constitutes the decision and order of the court.

I concur EM I concur WM I concur KBG

APPENDIX B

Findings of Fact

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK : TRIAL TERM : PART 9

MARO LEATHER CO.,
Plaintiff
- against -
AEROLINEAS ARGENTINAS, INDEX NO. 48027/85
Defendant and Third-
Party Plaintiff,
- against -
TRANS WORLD AIRLINES, INC.,
Third-Party Defendant

---

111 Centre Street
New York, New York
February 25, 1991

BEFORE:

HONORABLE JANE S. SOLOMON, Justice

APPEARANCES:

DONOVAN, PARRY, WALSH & REPETTO
BY: PAUL H. MURPHY, ESQ.
MICHAEL J. RANT, ESQ.
(For the Plaintiff)
BIGHAM, ENGLAR, JONES & HOUSTON
BY: EDWARD SADOWSKY, ESQ>
(For the Defendant)

* * * * *

THE COURT: Gentlemen, I am not going to delay this any further.

As for findings of fact here almost everything is conceded and that is that the plaintiff ordered from Argentina nine pallets

of leather. They were flown to the metropolitan area, Kennedy, by the defendant. They were then placed in a warehouse which was the defendant's or that of the defendant's agent and then the plaintiff sent its agent the trucker Mr. Lueddeke to get the final pallets. He went on both February 1, 1984 and February 2, 1984. By the records of the defendant or its agent several pallets were picked up and I refer everybody to what is exhibit six in evidence at the trial here which has 2/1/84 and is circled three and 2/2/84 and circled four and I refer everybody to exhibit five which has a very clearly circled seven of nine on the Aerolineas tally sheet, a marking that I think says, "not locate two pieces on 2/2/84", and on the lower right side markings suggesting that rather than seven, nine pieces were picked up. We have Mr. Lueddeke's signature twice and a three next to one of his signatures and a four next to the other.

We have something else that then said four pieces and as far as I am concerned, it appears Lueddeke initialed three and then he initialed four and the odd four pieces in a circle has to do with something else. This piece of paper is totally inconsistent with eleven pieces which were its subject having been signed for on it.

I recognize that reasonable people could disagree and reasonable people in disagreeing might also rely on Exhibit 7 or 7-A, whichever form you like to look at, to Exhibit 12, namely, the better and worse copies of what appear to be several slips of paper produced by Mr. Lueddeke who seems to be a thoroughly disagreeable human being and who confounded the nature of this matter, making it more disagreeable, but I am not at all persuaded that there is anything in evidence which makes him a liar and unworthy of belief and I hold that the plaintiff has proved that its agent Mr. Lueddeke only got seven of the nine pallets within the burden of proof that it has to meet here.

The question of whether the defendant is responsible for the shortage is resolved against the defendant because its own documents which support the notion that only seven pieces were picked up and all nine were apparently received by it. That leaves only the question of whether or not interest should run in excess of a total judgment amount of twenty-four thousand dol-

lars which is what The Warsaw Convention would permit from after, I guess, February 6, 1984, and I think since while almost all the cases were given to me in Xerox form by each of the lawyers when we last met the formal memorandum of it was not given to me until this morning.

I suggest, in order to lance [*sic*] this problem, is if Mr. Sadowsky could tolerate the thought that we break for lunch. If you need a pass to go to our library on the tenth floor if you don't have all the cases here or anything else that you want, that we reconvene at about two and see if we can't make a ruling on the record which will put this case to bed.

MR. SADOWSKY: I am prepared to argue it now.

THE COURT: Go ahead.

MR. MURPHY: Your Honor, in the memorandum submitted to you in the cases we all understand that there is two lines of thoughts, or I should say, there are two ways the decisions have gone.

There are certain cases that have held in the Warsaw case and I note I think principally those are personal injury cases involving something called The Montreal Agreement which is a bilateral agreement among airlines. It is not, per se, The Warsaw Convention. I raise it in all respects. I don't know that it is a definitive difference and I am not suggesting the cases would not be applicable. I just point it out.

Your Honor, this case cries out for the award of interest. I have been trying to resolve this case since 1985. It is a February 1984 loss.

As Your Honor knows, because unfortunately through some of the motions that came down the pike in this case there have been any number of tangential motions which have effectively delayed today's day of reckoning for four or five years.

THE COURT: I will tell you and Mr. Sadowsky now that I agree with you; that if any case cries out for the award of interest and the notion that a defendant should not be able to hide behind The Convention to defend the lawsuit so that recovery is totally negated, this is it. By what authority may I say that The Convention doesn't apply?

MR. MURPHY: The question discussed last time included whether this court must follow the Second Circuit instruction and that decision did in fact rule that interest would not be allowed.

THE COURT: It is a property damage, not an injury case because I frankly believe you could say that personal injury cases have a cap and interest couldn't possibly run because you don't know what it would run on until you had a jury award. These are different. We all know what it would be applied to. Why is the Civil Court decision of 1986, which nobody appealed, more binding on me or persuasive for your purposes than the Second Circuit decision which proceeded [*sic*] it and which also is a property damage case?

MR. MURPHY: I think the answer is, Your Honor, as I understand the law as set forth in my memorandum, this Court is not bound to follow Second Circuit. It may look to any federal court for guidance, but not need follow any decision but for a decision of the United States Supreme Court.

As we pointed out in our memorandum of law, this issue has only been before the United States Supreme Court once. Unfortunately for all of us, and I mean that sincerely, it was a binding precedential judgment from the Supreme Court, but in that one instance where the issue was before The Supreme Court it affirmed the granting of interest, so to the extent that that is guidance from The Supreme Court and as best as my research has disclosed that is the only time The Court has had the issue before it, Your Honor. The Supreme Court has affirmed it, the award of interest and again, as I say, there is nothing that I can understand or have seen in the law that compels this court to follow The Second Circuit.

As is The Fifth Circuit, this court can look for guidance to either circuit or any Federal Court without being compelled to hold it against The Court's own inclinations.

MR. SADOWSKY: I ask The Court to pay judicial notice of The Warsaw Convention title 49 section 1502, and I have a copy of it for you, if The Court would like to see it.

The purpose of The Warsaw Convention was to establish a sense of stability when The Warsaw Convention was promulgat-

ed many, many years ago. The Warsaw Convention did not address the issue of pre-judgment of interest as it felt that without having interest airlines and air carriers would be more disposed to settling their cases. The United States is a signatory to this Warsaw Convention and this is the supreme law of the land as a treaty of The United States as ratified by the congress and signed by the president. Whether we like it or not, state courts must abide by this precedent in the nature of the statute, in the nature of the *Deere* case and *O'Rourke* and other authorities which my opposing counsel has cited.

Why did the writers of this convention not include interest? Because they realized on a very scholarly level that interest would only impede settlement in cases and I mean this sincerely, Your Honor, contrary to the statements made by my opposing counsel that this case is dragged out. I can assure you that if it has taken as long as it has it was because of the complexity of the case, the numerous notices to admit, depositions, motions, any continuances in this case I have granted to my opposing counsel.

THE COURT: We are not faulting Mr. Murphy or myself in agreeing with this motion that this case has taken a long time. We are faulting you.

You don't have to defend yourself. Let's go.

MR. SADOWSKY: The *Eli Lily versus Aerolineas Argentinas* from Judge Shirley Fingerhood of this courthouse, in my shepardizing this case it has only been cited once as precedent and that was in a footnote in another case in which it was not relied upon that judgment interest in Warsaw Convention case was applicable.

I would respectfully say to a judge of this court that this particular opinion is not of precedential value and I ask The Court not to follow it.

The case in which this Eli Lily case is referred to is the *Floyd versus Eastern Airlines* case of the Eleventh Circuit.

THE COURT: That is a personal injury case.

MR. SADOWSKY: If I recall, yes.

I would ask The Court to not follow this *Eli Lily* case as I do not think, and I say this as an officer of the court, that it is

good law. It has not been followed by any single state court in a Second Circuit or cited with approval. I think it is vulnerable to attack. Perhaps in today's mode of transportation the Warsaw Convention should be modified or changed in some way, but that scenario is not presented to this court. We can only go by what The Warsaw Convention says.

There is no indication that interest is applicable and I would advise that interest should be denied.

Thank you, Your Honor.

THE COURT: On this issue I am ruling in favor of the plaintiff and the following decision and the reasoning of Judge Fingerhood in *Eli Lily against Aerolineas Argentinas* which is reported as given to me at Aviation Reporter seventeen thousand nine sixty-nine, according to that Xerox; also at 508 N.Y. Supp. 2nd 865, a November 12, 1986 decision of this Court seems to me that if you are concerned about what everyone says the Warsaw Convention is concerned about, namely, the fixed liability of a defendant, we know that the statutory interest rate rarely changes and if it does everybody knows about it and in New York State it is nine percent. That interest rate should run from February 2nd, the date provided when I was grasping for the date, as opposed to the month, by the attorney for the defendant.

I want to be perfectly clear. There seems to be no dispute among the parties that the sums sought by the plaintiff of liability is the dollar amount of twenty-three thousand twenty-four dollars and ninety cents, an amount being less than whatever the proper calculation under the Warsaw Convention would be.

Accordingly, the plaintiff may have judgment for twenty-three thousand twenty-four dollars and ninety cents with interest to [*sic*] the statutory rate from February 2, 1984.

It is so ordered.

Judgment

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

MARO LEATHER CO., Plaintiff, - against - AEROLINEAS ARGENTINAS, Defendant and Third-Party Plaintiff, - against - TRANS WORLD AIRLINES, INC., Third-Party Defendant	Index No. 48027/85 Judgment Rendered in Favor of Maro Leather Co., Plaintiff, Residing at 825 Broadway, Newark, New Jersey 07104

Amount awarded after Trial		$23,024.90
Interest 9% from 2/2/84		17,790.00
Total		$40,814.90
Costs by Statute	300.00	
Service of summons and complaint		
Filing of summons and complaint	20.00	
Prospective Marshal's Fee	22.50	
Filing of Notice of Trial	25.00	
Jury Fee	N/A	
Total		$41.182.40

STATE OF NEW YORK, COUNTY OF NEW YORK

The undersigned, attorney at law of the State of New York one of the attorney(s) of record for the plaintiff(s) in the above entitled action, states that the disbursements above specified have been or will necessarily be made or incurred therein and are reasonable in amount.

That a decision has been rendered after trial in favor of the plaintiff(s) and against defendant, Aerolineas Argentinas.

The undersigned affirms this statement to be true under the penalties of perjury.

Dated: New York, New York
July 22, 1992

Matthew S. Schorr
Matthew S. Schorr

Judgment entered on AUG 26 1992.

The summons and complaint in this action having been served on AEROLINEAS ARGENTINAS, the defendant(s) herein on the 22nd day of July 1985 and the judgment rendered in favor of plaintiff(s) against said defendant(s) Aerolineas Argentinas after trial before Judge Jane S. Solomon on the 25th day of February 1991.

Now, on motion of Donovan Parry Walsh & Repetto, attorney(s) for the plaintiff it is,

ADJUDGED that MARO LEATHER CO. plaintiff(s) residing at 825 Broadway, Newark, New Jersey 07104, recover(s) of AEROLINEAS ARGENTINAS, defendant(s), residing at 9 Rockefeller Plaza, New York, defendant(s) the sum of $23,024.90 with interest of $17,790.00 making a total of $40,814.90 together with $367.50 costs and disbursements, amounting in all to the sum of $41,182.40 and that plaintiff(s) have execution therefor.

Jack Baer, Clerk
Entered per instructions of M. Pickens

APPENDIX C

At an Appellate Term of the Supreme Court, first department, held at the Court House, Borough of Manhattan, City of New York, on the 13th day of October, 1994.

Present: Hon. EDITH MILLER, J.P.
Hon. WILLIAM P. McCOOE
Hon. KRISTIN BOOTH GLEN, *Justices.*

MARO LEATHER CO.,
Plaintiff-Respondent, 570336/93
- against -
AEROLINEAS ARGENTINAS, *Order upon motion.*
Defendant-Appellant and
Third-Party Plaintiff, cal #93-257
- against -
TRANS WORLD AIRLINES, INC.,
Third-Party Defendant

The above named appellant having by notice of motion dated the 8th day of August 1994 moved for an order granting reargument, or in the alternative, for leave to appeal to the Appellate Division - First Department from an order of this Court dated July 19, 1994.

Now upon reading and filing said notice of motion and the affidavits of Paul Ambos verified the 8th day of August 1994 and the 22nd day of August 1994 and the papers annexed in favor of said motion, and the affidavit of Paul H. Murphy verified the 16th day of August 1994 in opposition thereto,

IT IS ORDERED that the said motion be and the same hereby is DENIED.

Enter,

[signature illegible]
Justice Appellate Term

APPENDIX D

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the Couty of New York, entered on December 13, 1994

Present -- Hon. Betty Weinberg Ellerin,
Richard W. Wallach
Sidney H. Asch
Eugene Nardelli
Peter Tom,

MARO LEATHER CO.,
Plaintiff-Respondent,
- against -
AEROLINEAS ARGENTINAS, M-5609
Defendant-Appellant and
Third-Party Plaintiff,
- against -
TRANS WORLD AIRLINES, INC.,
Third-Party Defendant

Defendant-appellant Aerolineas Argentinas having moved for leave to appeal to this Court from the order of the Appellate Term of the Supreme Court in this action entered in the office of the Clerk of the Supreme Court on July 19, 1994,

Now, upon reading and filing the papers with respect to said motion, and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied.

Enter:

David Spokony
Deputy Clerk

APPENDIX E

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

MARO LEATHER CO.,
Plaintiff,
- against -
AEROLINEAS ARGENTINAS,
Defendant and
Third-Party
Plaintiff,
- against -
TRANS WORLD AIRLINES, INC.,
Third-Party
Defendant.

NOTICE OF APPEAL

Index No. 48027/85

Defendant-appellant, relying upon the question directly involving the construction of the provisions of Article VI, Clause 2 of the Constitution of the United States, hereby appeals as of right to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court of the State of New York, First Department, entered in the office of the Clerk of the Appellate Division on December 13, 1994, which unanimously denied leave to appeal from the decision-order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered therein on July 19, 1994, which unanimously affirmed a judgment of the Civil Court of the City of New York, County of New York (Jane Solomon, J.) entered in the office of the Clerk of the Court on August 26, 1992 in favor of plaintiff and against defendant in the amount of

$40,814.90 inclusive of prejudgment interest and costs, and defendant appeals from each and every part of said order of the Appellate Division and from the whole thereof.

Dated: New York, New York
December 19, 1994

Bigham Englar Jones & Houston
Attorneys for Defendant-Appellant
14 Wall Street, 22nd Floor
New York, New York 10005
(212) 732-4646

To: Donovan Parry Walsh & Repetto
Attorneys for Plaintiff-Respondent
161 William Street
New York, New York 10038
(212) 964-3553

APPENDIX F

State of New York,
Court of Appeals

At a Session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of February 1995

Present, Hon. Judith S. Kaye, *Chief Judge, presiding*

Mo. No. 200 SSD 6
MARO LEATHER CO.,
Respondent,
v.
AEROLINEAS ARGENTINAS,
Appellant,
v.
TRANS WORLD AIRLINES, INC.,
Third-Party Defendant

The appellant having filed notice of appeal in the above title and due consideration having been therupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that the Court does not have jurisdiction to entertain the appeal (NY Const, art. VI, sec. 3; CPLR 5601).

Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX G

Order

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 20, 1988.

Present - Hon. Francis T. Murphy, Presiding Justice
Joseph P. Sullivan
Sidney H. Asch
Ernst H. Rosenberger
Richard W. Wallach, Justices.

Maro Leather Co.,
Plaintiff-Appellant,
-against-
Aerolineas Argentinas, 34857
Defendant-Respondent
and Third-Party Plaintiff,
-against-
Trans World Airlines, Inc.,
Third-Party Defendant.

An appeal having been taken to this Court by the plaintiff-appellant from an order of the Appellate Term of the Supreme Court, First Department, entered on or about October 21, 1987, which reversed an order of the Civil Court, New York County (Emily Goodman, J.), entered on September 23, 1986 and granted summary judgment in favor of defendant Aerolineas Argentinas dismissing the complaint,

And said appeal having been argued by Paul H. Murphy of counsel for appellant, and by Paul Ambos of counsel for defendant-respondent and third-party plaintiff; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same hereby is reversed, on the law, and the judgment of the Civil Court reinstated. Appellant shall recover of defendant-respondent and third-party plaintiff $75 costs and disbursements of this appeal.

Enter:

Francis X. Galdi
Deputy Clerk

Decision

SUPREME COURT APPELLATE DIVISION
First Department, October 1988

Dec 20, 1988

Francis T. Murphy, P.J.
Joseph P. Sullivan
Sidney H. Asch
Ernst H. Rosenberger
Richard W. Wallach, JJ.

Maro Leather Co.,
Plaintiff-Appellant,
against
Aerolineas Argentinas, 34857
Defendant-Respondent
and Third-Party Plaintiff,
against
Trans World Airlines, Inc.,
Third-Party Defendant.

Appeal by the plaintiff-appellant from an order of the Appellate Term, First Department, entered on October 21, 1987, which reversed an order of the Civil Court, New York County (Emily Jane Goodman, J.), entered September 23, 1986 and granted summary judgment in favor of defendant Aerolineas Argentinas dismissing the complaint.

Paul H. Murphy, of counsel (Joseph A. Scalzo with him on the brief; Donovan, Maloof, Walsh & Repetto, attorneys) for plaintiff-appellant

Paul Ambos, of counsel (Walsh and Levine, attorneys) for defendant-respondent and third-party plaintiff

ASCH, J.

Plaintiff Maro Leather Co., an importer, was the consignee of nine pallets of unfinished leather from Argentina. The complete shipment of nine pallets was manifested aboard defendant

Aerolineas Argentinas' flight 310 of January 29, 1984 from Buenos Aires to New York. Aerolineas' Delivery Tally, dated February 2, 1984, reflected that only seven of the nine pallets were delivered to plaintiff's agent. The tally also showed that the delivery was made in two lots of three and four pallets, respectively.

On February 10, 1984, plaintiff's freight forwarder, Trans World Shipping Corp., filed a notice of claim with Aerolineas for the loss of the two pallets. Aerolineas did not pay the claim and plaintiff commenced this action seeking $23,024.90, the value of the two missing pallets. Defendant answered and asserted, *inter alia*, the affirmative defense that it was not liable to plaintiff because the notice of claim was not filed within the applicable time period.

It is undisputed that the Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention") (49 USC § 1502) applies. Article 16 of that Convention provides:

> (1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.
>
> (2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.
>
> (3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.
>
> (4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

The Convention imposes no notice requirement on a shipper whose goods are lost or partially lost.

Defendant's Cargo Tariff Rule No. 23 and the terms and conditions of the contract of carriage (air waybill), which are substantially the same, also set out the rights of the parties.

The pertinent part of defendant's Cargo Tariff Rule No. 23 provides:

> No action shall be maintained in the case of damage to or partial loss of cargo unless a written notice, sufficiently describing the cargo concerned, the approximate date of the damage, and the details of the claim is presented to an office of Carrier within 7 days from the date of receipt thereof, in the case of delay, unless presented within 14 days from the date the cargo is placed at the disposal of the person entitled to delivery of the consignment, and in the case of loss (including non-delivery) unless presented within 120 days from the date of issue of the air waybill.

The terms and conditions of the contract of carriage set out in the air waybill state in pertinent part:

> No action shall be maintained in the case of damage to goods unless a weitten [*sic*] notice, sufficiently describing the goods concerned, the approximate date of the damage, and the details of the claim, is presented to an office of Carrier within 7 days from the date of receipt thereof, in the case of delay, unless presented within 14 days from the date the goods are placed at the disposal of the person entitled to delivery, and in the case of lass [*sic*] (including non-delivery) unless presented within 120 days from the date of issue of the air waybill.

Plaintiff's claim was filed eight days after February 2, 1984, the date of receipt of seven of the nine pallets.

The Civil Court found that short delivery under the facts of this case constituted "loss" as opposed to "partial loss" and ruled that the 120-day notice period was applicable. Accordingly, it granted plaintiff's motion for partial summary judgment dismissing defendant's first affirmative defense.

Appellate Term viewed the delivery of only seven of nine pallets as partial loss of a total shipment, in accordance with its prior decision in *Leather's Best, Inc. v Aerolineas Argentinas* (136 Misc2d 797). It consequently applied the seven-day period and granted summary judgment in favor of defendant, dismissing the complaint.

The issue, simply put, is whether the loss of two pallets from a total shipment of nine pallets would constitute a "partial loss" to activate the seven-day notice provision of the defendant's tariff or a "total loss" of part of the shipment allowing the application of the 120-day notice provision of the tariff.

The Appellate Term of this Department, in a well-reasoned decision in *Leather's Best, Inc. v Aerolineas Argentinas* (*supra*), construed identical tariff provisions in a case where one of a shipment of three pallets of leather was lost. In finding the seven-day notice provision applied, that court held in pertinent part:

> The loss of 1 of the 3 pallets of a shipment constitutes a "partial loss" of a total shipment, not a total loss of part of the shipment within the meaning of defendant's tariff. Thus, the "partial loss" aspect of the notice of claim provision controls this transaction (*Travelers Indem. Co. v Alia Airlines*, 18 Av Cas 17, 687, *affd without opn* NYLJ, Apr. 4, 1985, at 6, col 1 [App Term, 1st Dept] [seven-day notice of claim "partial loss" provision applied to loss of 2 of 8 packages of microfilm equipment under identical tariff rule]).
>
> Significantly, in cases of "damage to or partial loss" of cargo, unlike the case of a total loss where no shipment ever arrives (a total failure to deliver) (*see*, 17 NY Jur 2d, Carriers, §320; *D'Arsi v Navigazione Alta Italia*, 91 Misc 10 (App Term, 1st Dept), *affd* 173 App

> Div 963), the consignee is immediately aware of the carrier's breach and, thus, the short notice of claim requirement should not be relaxed.
>
> Here, plaintiff consignee clearly was on notice that 1 pallet was missing as evidenced by the notation on the trucker's receipt and the description of the shipment as consisting of 3 pallets, packages or pieces (*see*, 1 Sorkin, How to Recover for Loss or Damage to Goods in Transit § 7.24 [3], at 784, n 49 [1986]). None of the documents describe the portion of the cargo delivered as a "part shipment," inducing plaintiffs to believe that the delivery of the remaining pallet and full satisfaction of the contract was imminent.

Leather's Best, Inc. v Aerolineas Argentinas, supra, at 799-800.)

However, this reasoning ignores the dichotomy set forth in defendant's tariff (and air waybill) between "damage to or partial loss of cargo" and "loss (including non-delivery)". The first category deals with claims for "damage" to goods delivered or "partial loss" of goods delivered, i.e., pilferage of some or all of the contents. As to this "partial loss", the seven-day notice provision applies since the carrier can undertake a prompt investigation. Further, since the goods are in the possession of the consignee, it can make a prompt inspection to determine if there is any damage or if there are any missing items in the shipment. However, when cargo is not delivered, we are faced with the second category of "loss (including non-delivery)", even when we are dealing, as here, with separate, discrete pieces of a single shipment which have not been delivered.

Judge Weinstein of the Eastern District of New York, in a scholarly decision in *Denby v Seaboard World Airlines, Inc.* (575 F Supp 1134, *revd on other grounds* 737 F2d 172), traced the history of article 26 of the Warsaw convention, its construction and the reasons for the notice provisions. While not raised by plaintiff herein, the court in *Denby* noted that the Convention, while establishing a notice provision for damaged delivered

goods, omitted a notice provision for lost or destroyed goods and baggage (*see* art 26, *supra*). However, the courts have consistently allowed carriers to fix some definite notice period after which the shipper may no longer assert the carrier's liability for the loss (*see*, *Denby v Seaboard World Airways*, *supra*, at 1138, and cases cited thereat).

Chief Judge Weinstein discussed the equation of partial loss of the contents of a piece of luggage (or container) with the "damage" called for in article 26 of the Warsaw Convention and then adopted the reasoning of *Fothergill v Monarch Airlines, Ltd.* (2 Lloyd's L.R. 295 [H.L.]). In that case an airline passenger filed a claim promptly for damage to his luggage, i.e., a split seam and a broken lock, but did not file a timely claim for articles he later found missing from the baggage. The House of Lords held that this partial loss of contents of the baggage *was* damage within the meaning of article 26 and, therefore, a timely claim for the lost articles was needed.

> Theoretically, the concept of "damage" as defined by the House of Lords could be extended to include any kind of shortage, as for example, when only one carton in a shipment of ten is delivered. This broader concept of damage was apparently the basis of the decision by the Supreme court of the Netherlands in *Affretair v. V O B*, Judgment of Feb. 12, 1982, RW 1982,50, where there was a short delivery of three packages out of twenty. The decision is cogently criticized by one commentator, partly on the ground that in *Affretair*, the short number of packages was visible on a single count, while in *Fothergill*, it was not immediately apparent that any items were missing from the suitcase. Note, *Supreme Court of the Netherlands: Affretair v. V O B or Fothergill's Dutch Treatment*, 7 J.Air L. 173, 176 (1982). As the author put it:
>
> > The present decision is more than an affirmation of the ruling of the House of

> Lords, which in fact dealt with a case of partial *loss of contents of* a suitcase and not with what Manckiewicz (sic) has described as 'partial loss *stricto sensu*', *viz.*, the loss of one or more packages/ suitcases carried under one air waybill/ baggage check.

Id. at 176 (citation omitted, emphasis in original).

> This distinction is the one we adopt. Loss of one or more whole packages whether cartons, loose pieces, suitcases or containers -- may need no written notice. But delivery of a package or container with part of its contents missing is damage and requires notice as held in *Fothergill*. *See, e.g., Hartford Fire Insurance Co. v Aerolineas Argentinas*, 16 Avi. 17,940 (N.Y. App. Term 1981) (relying on *Fothergill* to require timely notice of damage for carton delivered short in weight).

(*Denby v Seaboard World Airlines, Inc. supra*, at 1141.)

Further, while reversing the District Court on other grounds and noting that "we agree with much of Chief Judge Weinstein's scholarly opinion", Judge Friendly of the Second Circuit, in yet another scholarly opinion, noted the general rule that ambiguities in a filed tariff are to be construed against the carrier (*Denby v Seaboard World Airlines, Inc.*, 737 F2d 172, 187). In summary, "loss (including non-delivery)" of an entire container or pallet must be distinguished from pilferage or theft from a sealed container. The former is readily brought to the carrier's attention, just as if the whole shipment were lost, when the consignee does not receive delivery of all goods on the manifest. The latter loss from theft, etc., however, is not readily noticeable and requires prompt notification to ensure investigation.

As indicated above, defendant's delivery tally reflected that only seven of the nine pallets were delivered to plaintiff's agent. It also noted that delivery was made in two lots of three and four

pallets and bore the further notation "N/L 2 pcs". Thus, non-delivery was not only readily apparent, but noticed, in this case. Accordingly, the 120-day notice period provided for in the case of "loss (including non-delivery)" applies.

Accordingly, the order of the Appellate Term, First Department, dated October 21, 1987, which reversed the order of the Civil Court, New York County (Emily Jane Goodman, J.), entered September 23, 1986, and granted summary judgment in favor of defendant Aerolineas Argentinas dismissing the complaint of plaintiff Maro Leather Co., should be reversed, on the law, and the judgment of the Civil Court reinstated, with costs and disbursements payable by defendant.

All concur.

Order filed.

APPENDIX H

Order

At an Appellate Term of the Supreme Court, first department, held at the Court House, Borough of Manhattan, City of New York, on the 21st day of October, 1987

PRESENT: HON. THOMAS J. HUGHES, P.J.
HON. STANLEY PARNESS
Justices.

MARO LEATHER CO.,
Plaintiff-Respondent,
-against-
AEROLINEAS ARGENTINAS,
Defendant and Third
Party Plaintiff-Appellant,
-against-
TRANS WORLD AIRLINES, INC.,
Third Party Defendant-
Respondent.

County Clerk's No. 92300/1987

Cal. No. 87-103

May 1987 Term

An appeal having been taken to this court by defendant from an order of the Civil Court of the City of New York, County of New York entered on the 23rd day of September 1986 and the said appeal having been heard and due deliberation having ben had thereon,

IT IS ORDERED AND ADJUDGED, that the order so appealed from be and the same is hereby reversed, with $10 costs, plaintiff's motion for partial summary judgment denied, and summary judgment granted in favor of defendant dismissing the complaint.

Enter,

[signature illegible]
Justice Appellate Term
Supreme Court, first dept.

Decision

APPELLATE TERM OF THE SUPREME COURT,
FIRST DEPARTMENT

MAY 1987

PRESENT: HON. THOMAS J. HUGHES, P.J.
HON. XAVIER C. RICCOBONO
HON. STANLEY PARNESS
Justices.

MARO LEATHER CO.,
Plaintiff-Respondent,
-against-
AEROLINEAS ARGENTINAS, #87-103
Defendant and Third
Party Plaintiff-Appellant,
-against-
TRANS WORLD AIRLINES, INC.,
Third Party Defendant-
Respondent.

Defendant appeals from an order of the Civil Court, New York County, entered September 23, 1986 (Emily J. Goodman, J.) which granted partial summary judgment in favor of the plaintiff and struck defendant's first affirmative defense.

PER CURIAM:

Order entered September 23, 1986 (Emily J. Goodman, J.) reversed, with $10 costs, plaintiff's motion for partial summary judgment denied, and summary judgment granted in favor of defendant dismissing the complaint.

Plaintiff sues in this action for damages sustained upon defendant's failure to deliver two of nine pallets of unfinished leather shipped from Argentina to New York as a consolidated shipment under a single air waybill. The defendant airline's tariffs provide that in the case of a "partial loss" of cargo, notice of claim must be made within seven days of receipt, whereas in the case of total loss, notice must be given within 120 days. In

an identical fact pattern, this court has recently concluded that the loss of one of a number of pallets constitutes a partial loss of the total shipment, not a total loss of part of the shipment, within the meaning of defendant's tariff (Leather's Best Inc. v. Aerolineas Argentinas, NYLJ, September 8, 1987, p. 14, c. 4). Accordingly, since it is undisputed that plaintiff did not file written notice of claim within seven days from the date of receipt of a portion of the cargo, summary judgment must be granted in favor of defendant dismissing the complaint.

I concur TJH
I concur SP

APPENDIX I

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK
SPECIAL TERM, PART I

Index No. 48027/85
Motion Cal. No. NP 24 of 7/28/86

MARO LEATHER CO.,
Plaintiff
- against -
AEROLINEAS ARGENTINAS,
Defendant and Third-Party Plaintiff,
- against -
TRANS WORLD AIRLINES, INC.,
Third-Party Defendant

Present:
Hon. Emily Jane Goodman
Judge

Plaintiff-consignee moves for an order granting it partial summary judgment striking the defendant and third party plaintiff's first affirmative defense.

Plaintiff-consignee instituted this action to recover the sum of $23,024.90 for non-delivery of two pallets of leather goods shipped with the defendant common carrier airline "Aerolineas" from Argentina to New York under its master air waybill 044-2400-2532 and House Air Way Bill Number, both dated January 27, 1984. According to the waybills 9 pallets were listed for delivery but only 7 arrived at the destination and were delivered to plaintiff on February 2, 1984

Defendant Aerolineas interposed an answer containing denials and five complete affirmative defenses.

In the first affirmative defense, the subject of attack here, Aerolineas alleged it is not liable because plaintiff failed to file a written Notice of Claim within the 7 day time limit set forth in Aerolineas tariffs on file with the United States Civil Aeronautics Board and the Warsaw Convention.

A review of the papers reveals plaintiff-consignee filed a proof of loss with Aerolineas on February 10, 194, eight (8) days after the short delivery of leather. Plaintiff takes the position the non-delivery 120 day limitation in the Aerolineas tariff governs and that it has filed its notice in time.

Defendant contends that its first affirmative defense is viable because the plaintiff's Notice of Intention to File a Claim was not timely because it was not filed within 7 days, the time prescribed in instances where only partial delivery was made.

The pivotal question is whether the claim is a partial loss or a loss, including non-delivery. If the claim is properly designated a partial loss, the notice of claim must be filed within 7 days. If the claim is designed a loss, including non-delivery, the notice must be filed within 120 days.

A review of the authorities reveals that under the circumstances that obtain in this case the trend has been to designate the short delivery as a "loss" rather than a partial loss. See *Siemens Corporation* v. *KLM Royal Dutch Airlines*, 19 Avi. 18,502-18,504 Commerce Clearing House Aviation Law Reports; *Leather's Best, Inc.* v. *Aerolineas Argentinas*, 19 Avi. 18,227, 500 NYS 28 492 (N.Y.C. Civ. Ct. 1986).

Accordingly, this court finds this to be a loss of two pallets; therefore the 130 day limit applies because the notice of loss was filed well before that deadline.

The motion is granted and the first affirmative defense is stricken.

Dated: 9/17, 1986

EJG
J.C.C.

APPENDIX J

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 16, 1989.

Present - Hon. Francis T. Murphy, Presiding Justice
Joseph P. Sullivan
Sidney H. Asch
Ernst H. Rosenberger
Richard W. Wallach, Justices.

Maro Leather Co.,
Plaintiff-Appellant,
-against-
Aerolineas Argentinas,
Defendant and Third-Party
Plaintiff-Respondent,
-against-
Trans World Airlines, Inc.,
Third-Party Defendant-
Respondent.

M-326
[34857]

Defendant/third-party plaintiff-respondent having moved for reargument or, in the alternative for leave to appeal to the Court of Appeals from, the order of this Court entered on December 20, 1988,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion be and hereby is denied, in its entirety, with $10 costs.

ENTER:

FRANCIS X. GALDI
Deputy Clerk

APPENDIX K

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

Index No.

MARO LEATHER CO.,
Plaintiff(s)

against

AEROLINEAS ARGENTINAS
Defendant(s)

SUMMONS
Plaintiff's Residence Address: 825 Broadway, Newark, New Jersey 07104
The basis of the venue designated is: Defendant's Place of Business

To the above named defendant(s)

You Are Hereby Summoned to appear in the Civil Court of the State of New York at the office of the Clerk of the said Court at 111 Centre Street in the County of New York City and State of New York, within the time provided by law as noted below and to file your answer to the complaint with the Clerk: upon your failure to answer, judgment will be taken against you for the sum of $23,024.90 with interest thereon from the 27th day of January 1984 together with the costs of this action.

Dated: New York, New York, July 18, 1985

DONOVAN, MALOOF, WALSH & KENNEDY
Attorney(s) for Plaintiff(s)
Post Office and Telephone Number
161 William Street, New York, New York 10038
(212) 964-3553

Defendant's Address
9 Rockefeller Plaza
New York, New York

NOTE: the law provides that: (a) If this summons is served by its delivery to you personally within the City of New York, you must appear and answer within TWENTY days after such service; or (b) If this summons is served by delivery to any person other than you personally, or is served outside the City of New

York, or by publication, or by any means other than personal delivery to you within the City of New York, you are allowed THIRTY days after the proof of service thereof is filed with the Clerk of this Court within which to appear and answer.

INDORSED COMPLAINT

A statement of the nature and substance of the plaintiff's cause of action is as follows:

Action to recover $23,024.90 for non-delivery of two pallets of leather goods shipped with defendant common carrier from Argentina to New York under its master air waybill number 044-2400 2543 and house air waybill number 4939. Plaintiff has been damaged in the foregoing amount which amount, although duly demanded, has not been paid.

DONOVAN, MALOOF, WALSH & KENNEDY
Attorney(s) for Plaintiff

APPENDIX L

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

MARO LEATHER CO.,
Plaintiff, ANSWER
-against-
AEROLINEAS ARGENTINAS,
Defendant. Index No. 48027/85

Defendant, AEROLINEAS ARGENTINAS, as and for its answer to the complaint of plaintiff served and filed herein, alleges:

1. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in the Indorsed Complaint.

AS AND FOR A FIRST COMPLETE AFFIRMATIVE DEFENSE

2. That under the terms of the contract of carriage, the applicable provisions of defendant's tariffs on file with the United States Civil Aeronautics Board, and/or the Warsaw Convention, defendant has no liability to plaintiffs or to any other person for any loss, damage, or delay unless a written notice of claim concerning such loss, damage, or delay is filed with defendant within the applicable time limit.

3. Upon information and belief, the proper written notice of claim concerning such loss, damage, or delay was not filed with defendant within the applicable time limit.

AS AND FOR A SECOND COMPLETE AFFIRMATIVE DEFENSE

4. Upon information and belief, any damages allegedly suffered by plaintiff herein resulted from the acts and/or omissions of plaintiff and/or certain third parties who were plaintiff's agents, servants, and/or employees and under plaintiff's control, and for whose conduct the defendant is not responsible.

AS AND FOR A THIRD COMPLETE AFFIRMATIVE DEFENSE

5. The contract of carriage embarked upon herein was in international and/or interstate transportation and as such was

governed, controlled, and made subject to all the terms and provisions of defendant's tariffs on file with the United States Civil Aeronautics Board, and/or the Warsaw Convention.

6. Under the terms of the contract of carriage, the applicable provisions of defendant's tariffs on file with the United States Civil Aeronautics Board and/or the Warsaw Convention, defendant has no liability to plaintiff nor to any other person for any loss, damage, or delay, unless the loss, damage, or delay is shown to have resulted from the negligence of defendant.

7. Upon information and belief, defendant is not guilty of any negligence and has taken all necessary measures to avoid any loss, damage, or delay under the contract of carriage.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

8. Under the applicable provisions of defendant's tariffs on file with the United States Civil Aeronautics Board and/or the Warsaw Convention, defendant has no liability to plaintiff or to any other person under the contract of carriage for any loss, damage, or delay where such loss, damage, or delay is shown to have been caused by or contributed to by the negligence or fault of plaintiff or his agents, servants, or employees.

9. Upon information and belief, any loss, damage, or delay was caused by or contributed to by plaintiff or his agents, servants, or employees.

AS AND FOR A FIFTH COMPLETE AFFIRMATIVE DEFENSE

10. Under the applicable provisions of defendant's tariffs on file with the United States Civil Aeronautics Board and/or the Warsaw Convention, defendant has no liability to plaintiff or to any other person under the contract of carriage for any consequential and/or special damages arising out of, or in any way connected with the loss, damage, or delay under the contract of carriage.

11. Upon information and belief, the damages allegedly suffered by plaintiff herein are of a consequential and/or special nature.

AS AND FOR A SIXTH COMPLETE AFFIRMATIVE DEFENSE

12. Defendant performed each and every obligation and duty required or it under the contract of carriage in a reasonable

and proper manner and delivered the shipment to a designated party who was an agent, servant, or employee of plaintiff at the point of destination that plaintiff requested said shipment to be delivered to, in the same order and condition it received the same.

13. By reason, thereof, defendant is not responsible to plaintiff nor to any other parties for the loss or damage allegedly sustained.

AS AND FOR A SEVENTH PARTIAL AFFIRMATIVE DEFENSE

14. Under the terms of the contract of carriage, the applicable provisions of defendant's tariffs on file with the United States Civil Aeronautics Board and/or the Warsaw Convention, the liability, if any, of defendant for any loss, damage, or delay is limited.

Dated: New York, New York
September 3, 1985

Walsh and Levine
Attorneys for Defendant
Aerolineas Argentinas
40 East 38th Street
New York, New York 10017
(212) 889-8450

To: Donovan, Maloof, Walsh & Kennedy
Attorneys for Plaintiff
161 William Street
New York, New York 10038
(212) 964-3553

No. 94-1507

APR 1 1 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

AEROLINEAS ARGENTINAS S.A.,

Petitioner,

vs.

MARO LEATHER CO.,

Respondent.

On Petition for Writ of Certiorari to the Appellate Term, First Department of the Supreme Court of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

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6623
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QUESTIONS PRESENTED

1. Does this Court have jurisdiction to issue a Writ of *Certiorari*?

2. Is there a conflict among the courts of New York State, the United States Court of Appeals for the Second Circuit, and other federal courts with regard to the issue of Notice of Claim, which conflict would justify the grant of *Certiorari* by this Court?

3. Should the Court in its discretion revisit for a third time the question of awarding pre-judgment interest under the Warsaw Convention?

PARTIES TO THE PROCEEDINGS

Respondent acknowledges that the list of parties submitted by Petitioner is accurate.

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No. 94-1507

In The

Supreme Court of the United States

October Term, 1994

AEROLINEAS ARGENTINAS S.A.,

Petitioner,

vs.

MARO LEATHER CO.,

Respondent.

On Petition for Writ of Certiorari to the Appellate Term, First Department of the Supreme Court of the State of New York

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions below are accurately described in the Petition and copies thereof are accurately reproduced in Petitioner's appendices. We note, however, that Respondent contends, contrary to Petitioner, that there is no basis for this Court to assume jurisdiction because Respondent has not exhausted all of its state court remedies.

STATUTORY PROVISIONS INVOLVED AND NOT CITED OR QUOTED BY PETITIONER

28 U.S.C. § 1257 State courts; certiorari

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right privilege, or immunity is specifically set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CPLR § 5501. Scope of review.

> (a) Generally, from final judgment. An appeal from a final judgment brings up for review:
>
> 1. any non-final judgment or order which necessarily affects the final judgment, including any which was adverse to the respondent on the appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken. . . .

CPLR § 5514. Extension of time to take appeal or to move for permission to appeal

(a) Alternate method of appeal. If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

CPLR § 5601. Appeals to the court of appeals as of right.

(a) Dissent. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a question of law in favor of the party taking such appeal.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and. . . .

CPLR § 5602. Appeals to the court of appeals by permission.

* * *

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

STATEMENT OF THE CASE

Respondent accepts as substantially accurate the statement of facts as recited by Petitioner. In stating what steps were taken with regard to the proceedings below, however, Petitioner has obviously not recited what it did not do, but could have done, after the appeal was dismissed by the Court of Appeals: it could have sought permission from the Appellate Division to appeal to the Court of Appeals.

We note one major inaccuracy, as well, concerning the decision of the trial judge herein. At pages twelve and thirteen, Petitioner states that the trial judge imposed interest under the mandatory provisions of CPLR § 5001, and made no finding as allegedly required by *Domanique v. Eastern Air Lines, Inc.*, 722 F.2d 256 (5th Cir. 1984), "to support the court's exercise of discretion". Reference to the decision below (A6-A11 of the Petition) fails to support Petitioner's contention that the award of interest was considered by the court to be mandatory. Indeed, the trial judge found "that if any case cries out for the award of interest and the notion that a defendant should not be able to hide behind The Convention to defend the lawsuit so that recovery is totally negated, this is it." (A-8 of Petition).

SUMMARY OF ARGUMENT

The Petition should be dismissed because this Court lacks subject matter jurisdiction under 28 U.S.C. § 1257. Petitioner failed to exhaust all of its state court remedies by failing to seek

leave to the Court of Appeals from the Appellate Division, First Department.

Alternatively, the Petition should be denied because there is no conflict between the state and federal courts on the issue of notice of claim, and this Court has twice left standing the award of pre-judgment interest by lower courts.

REASONS FOR DISMISSING OR DENYING THE WRIT

I.

THE PETITION FOR A WRIT OF *CERTIORARI* SHOULD BE DISMISSED BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION.

In seeking *certiorari* Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257. The statute provides, in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . .

Petitioner seeks review of a final order of the Appellate Term of the New York Supreme Court, First Department, dated July 19, 1994, and a prior non-final decision of the Appellate Division, First Department in the same case, entered December 20, 1988. Inasmuch as these are not the highest courts of New York in which a decision could have been had, review by the Supreme Court is precluded.

After the final decision of the Civil Court was affirmed by the Appellate Term, Petitioner sought leave to appeal to the

Appellate Division, first from Appellate Term, and then from the Appellate Division itself. Both of these motions were denied. Petitioner then sought to invoke the mandatory jurisdiction of the Court of Appeals, the highest court of the State of New York pursuant to CPLR § 5601(b)(1). The Court of Appeals dismissed the appeal *sua sponte* (after counsel for Respondent wrote a letter challenging jurisdiction), on the ground that mandatory jurisdiction did not lie under CPLR § 5601(b)(1).

What Petitioner did not do but could have done, was to seek permission to appeal pursuant to CPLR § 5602(b)(2)(i). This section states, in pertinent part:

> An appeal may be taken to the court of appeals by permission of the appellate division:
>
> * * *
>
> 2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency. . .[1]
>
> * * *
>
> (i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601. . . .

As noted above, it was under CPLR § 5601(b) that Petitioner

1. This action originated in the Civil Court of the City of New York.

sought to invoke the mandatory jurisdiction of the Court of Appeals, which permits review of Appellate Division orders which finally determine an action and which directly involve the construction of the Constitution of the United States. Although the Appellate Division's order finally determined the action, mandatory jurisdiction did not lie because what was directly involved was not the construction of the Constitution of the United States, but rather the terms of the Warsaw Convention. Under New York's statutory scheme for mandatory jurisdiction the Petitioner could not take an appeal as of right.

Nevertheless, Petitioner could have had its appeal heard by the Court of Appeals, by seeking permission from the Appellate Division under CPLR § 5602(b)(2)(i), to appeal to the Court of Appeals from the same Appellate Division order which it sought to appeal as of right. Grounds for seeking leave to appeal to the Court of Appeals existed. The Appellate Division's order finally determined the action; the action originated in the Civil Court (which is not one of the courts excluded in paragraph 2 of CPLR § 5602(b)(2)); and the action was not appealable as of right pursuant to CPLR § 5601(b)(1).

Even though the appeal as of right was dismissed, Petitioner still had time to move for leave to appeal. Under CPLR § 5514(a), when an appeal taken as of right is dismissed, and an alternate method for taking an appeal exists, such as by moving for permission to appeal, the time for moving for permission (30 days) runs from the date of dismissal of the appeal. Thus, Petitioner was not precluded by time from seeking permission.

Additionally, even though Petitioner had sought leave to appeal in 1988 from the Appellate Division's non-final order, (which only dealt with the issue of notice of claim), this order could have been reviewed by the Court of Appeals if leave was granted from the Appellate Division order which finally

determined the action. Under CPLR § 5501(a) the prior order could be reviewed because an appeal from final judgment brings up for review "any non-final judgment or order which necessarily affects the final judgment . . ."

Merely because the Court of Appeals dismissed the appeal taken as of right does not mean that the highest court of the state "rendered" a decision providing subject matter jurisdiction under 28 U.S.C. § 1257. In *Gotthilf v. Sills*, 375 U.S. 79, 84 S. Ct. 187, 11 L. Ed. 2d 159 (1963), this Court addressed a somewhat similar set of circumstances, and, over an earnest dissent by Justice Douglas, dismissed a writ of *certiorari*.

In the *Gotthilf* case, which arose in New York, the Petitioner had filed a motion for leave to appeal to the Court of Appeals from an Appellate Division, First Department ruling. The appeal was dismissed because the Appellate Division order was not final, and thus leave could not be sought from the Court of Appeals. Petitioner then filed a notice of appeal, but the appeal was dismissed because there was no grounds for mandatory jurisdiction. *Certiorari* was sought and granted. However, upon its review of the appeal itself, the Supreme Court found that despite the two dismissals in the Court of Appeals, the "judgment of the Appellate Division" is not that of the "highest court of a State in which a decision could be had" within the meaning of 28 U.S.C. § 1257 (375 U.S. at 80, 84 S. Ct. at __, 11 L. Ed. 2d at 161). The court noted that the Petitioner could have sought leave from the Appellate Division to proceed to the Court of Appeals, and did not. Thus, it found that *certiorari* was erroneously granted.[2]

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2. That defendant sought leave to appeal from the decision of the Appellate Division in 1989 is irrelevant. The only issue before the Appellate Division was the timeliness of the notice of claim. The issues regarding pre-judgment interest had not arisen. Both issues could have been addressed if the Court of Appeals heard the appeal from the July 19, 1994 order since under

(Cont'd)

Likewise, in this case, although the Court of Appeals dismissed the appeal taken as of right, Petitioner still could have sought leave to appeal from the Appellate Division, as the Petitioner in *Gotthilf* could have done. Since it did not, the writ for *certiorari* must be dismissed. As was stated in *Gorman v. Washington University*, 316 U.S. 98, 100-101, 62 S. Ct. 962, 86 L. Ed. 1300 (1942):

> It was the purpose of the Judiciary Act of February 13, 1925, as well as that of all its predecessors, that no decision of a state court should be brought here for review either by appeal or certiorari *until the possibilities afforded by the state procedure for its review by all state tribunals have been exhausted.*

(Emphasis supplied).

Petitioner has not exhausted all of its state court remedies. Since it has not, the Supreme Court does not have subject matter jurisdiction to entertain the appeal, and the writ of *certiorari* should be dismissed.

II.

THERE IS NO CONFLICT IN FEDERAL LAW CONCERNING THE PERIOD IN WHICH A NOTICE OF CLAIM SHOULD BE FILED.

The essence of Petitioner's argument at pages 13 through 19 of its brief is that there is conflicting law as to whether the loss of

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(Cont'd)

CPLR § 5501(a)(1), as noted above, an appeal to the Court of Appeals would have also brought up for review any non-final order such as the earlier order dealing with notice of claim questions.

discrete packages from a larger shipment, as opposed to loss from within a particular package, constitutes a "partial loss" or a "loss". If the loss of discrete packages constitutes a partial loss then the seven day notice provision of Article 26 of the Warsaw Convention applies. If the loss of discrete packages is found to be merely "loss" then the Warsaw Convention itself does not require any notice. Carriers' airway bills and tariffs, including Petitioner's herein, would, under this circumstance, require written notice within 120 days.

The fallacy in Petitioner's argument is that there is no conflict in federal or state law.

Any discussion of notice of claim in a partial loss situation begins with an analysis of *Fothergill v. Monarch Airlines, Ltd.*, [1981] A.C. 251 (H.L. 1980). When Mr. Fothergill arrived at destination his suitcase was delivered to him. He noticed that the suitcase itself was ripped and promptly (within 7 days) presented notice of claim to the carrier concerning the damage to the suitcase. He thereafter discovered that certain of his belongings were missing from the suitcase. However, he did not make further timely (*viz.*, within seven days) claim to the carrier. The court ultimately held that pilferage from within the delivered suitcase was damage within the meaning of Article 26(2) of the Warsaw Convention, and thus the claim for the missing items would fail due to the absence of a timely claim.

Many cases have discussed *Fothergill* and, as in, for example, *Denby v. Seaboard World Airlines, Inc.*, 575 F. Supp. 1134 (E.D.N.Y. 1983); *rev'd*, 73 F.2d 172 (2nd Cir. 1984) discussed below, it has always been understood that had Mr. Fothergill taken three suitcases with him on the fateful day, and only two of them were delivered, the total non-delivery of the one suitcase would not be "damage" and thus would not require a seven day notice of claim. We note that at page 14 of its brief,

Petitioner argues that the rule is otherwise in the United Kingdom now due to some domestic legislation there which expanded and altered the holding of *Fothergill*. While this may well be, it does not have an impact on the proper interpretation of the Warsaw Convention in this country, or otherwise.

The leading case in this county is *Denby v. Seaboard World Airlines, Inc., supra*. The Second Circuit observed that the loss of discrete packages within a larger shipment would not require notice within seven days as required by Article 26(2) (*id.* at p. 179). The Court also stated that if the cartons were missing from one container carrying all the cartons that were shipped, then notice should be given within seven days; presumably so that the airlines could immediately be put on notice of the particular loss of goods shipped in a container. Where packages were shipped separately, however, and some of them are not delivered, such a loss is not partial and the immediate notice requirements of Article 26(2) are not essential to putting the airline on notice of the loss.

There is no countervailing language or holding in any federal case. Indeed, there does not appear to be any federal case directly on point. None of the cases cited by plaintiff contradict *Denby*. In *St. Paul Insurance Co. of Illinois*, 807 F.2d 1543 (11th Cir. 1987) for instance, the court held that contract of carriage included the carrier's duly filed tariff, but noted in *dicta* that it approved of the distinction enunciated in *Denby* between damage and loss. (*Id.* at 1549).

In *Highlands Insurance Co. v. Trinidad and Tobago (BWIA International) Airways Corp.*, 739 F.2d 536 (11th Cir. 1984), the court held that seven day notice provisions apply even where cargo is significantly damaged because the air carrier is not on actual notice of the damage. Obviously, in *Denby*, the carrier was well aware of the non-delivery of certain containers.

The interpretation of Article 26 and the relevant carrier's air bills and tariff provisions, as established by the highest court in New York State to consider the issue, is the decision of the Supreme Court, Appellate Division, First Department herein (*see* pages A-21 through A-28 of Petitioner's appendices). The result reached is completely in accord with the *Denby* decision and indeed Justice Asch, writing for the court, specifically made reference to Judge Weinstein's "scholarly decision" in *Denby*. Justice Asch also agreed with Judge Friendly of the Second Circuit in "yet another scholarly opinion". Accordingly, the decisions on the issue of notice of claim in a partial loss situation are in accord in both the various United States Court of Appeals, as well as New York State.

Indeed, the only "conflict" shown in Petitioner's brief is in *Affretair (Compagnie Gabonaise d'Affretement Aerien) v. VOB*, RW 1982, 50 (HR 1982) *reprinted in* 7 J. Air L. 173 (1982).

As noted by Judge Weinstein in *Denby*, and as quoted in the Appellate Division's decision herein, the *Affretair* case has been "cogently criticized" for extending "damage" to any kind of shortage including a shortage of one out of 10 pieces shipped. Such a decision, which has been noted, and yet not followed by any federal court or New York State court, is not sufficient to constitute a "conflict between the Circuits" so as to suggest the need for *certiorari*.

The case law in the United States is consistent, and thus *certiorari* should be denied on this issue.

III.

INASMUCH AS THE ISSUE HAS BEEN BEFORE THIS COURT TWICE PREVIOUSLY THERE IS NO REASON TO GRANT *CERTIORARI* ON THE ISSUE OF PRE-JUDGMENT INTEREST.

The issue of whether pre-judgment interest in excess of the limitations of the Warsaw Convention should be awarded has twice previously been before this Court, and both decisions have left intact lower court decisions which upheld pre-judgment interest. Under such circumstances, the issue need not be revisited at this juncture.

In *Eastern Airlines, Inc. v. Mahfoud*, 474 U.S. 213, 106 S. Ct. 586, 88 L. Ed. 2d 522 (1985) the Court affirmed by an equally divided court a Fifth Circuit decision which had awarded pre-judgment interest under the Warsaw Convention. 729 F.2d 777 (5th Cir. 1984), *mem. aff'g*, 17 AV CAS (CCH) 17, 714 (W.D. La. 1982).

Eleven years later the Court has not reversed itself; and, eleven years after the institution of suit herein, Petitioner is still resisting the day of judgment.

In the same year that *Mahfoud* was affirmed, the Court also denied *certiorari*[3] in a cargo case similar to this matter, where pre-judgment interest was awarded in excess of the weight limitation of the Convention. *Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir.), *cert. denied*, 469 U.S. 1186, 105 S. Ct. 951, 83 L. Ed. 2d 959 (1985). The anticipated argument by Petitioner that

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3. It is somewhat ironic that the year the Supreme Court denied *certiorari* — 1985, was the same year suit was instituted in this matter.

certiorari in *Boehringer* was denied because *Mahfoud* was already pending is rebuttable because *Mahfoud* was a personal injury case and *Boehringer* a property damage case. It is quite possible that these two types of cases could be treated differently, inasmuch as many jurisdictions permit pre-judgment interest for property damage cases while not for personal injury (New York, for instance).

While we recognize the limited precedential value of a denial of *certiorari*, the point remains that on the two occasions where the issue has come before the Supreme Court, the Court has left standing lower court decisions which awarded pre-judgment interest. If *certiorari* is denied here, Petitioner's arguments concerning confusion in the federal Circuits would be put to rest. The legal equivalent of "three strikes and you're out" would make it clear to all practitioners that pre-judgment interest could be awarded under the circumstances presented.

CONCLUSION

Accordingly, for all of the foregoing reasons Petitioner's request for a writ of *certiorari* should be dismissed, or in the alternative, should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

AEROLINEAS ARGENTINAS S.A.,

Petitioner,

vs.

MARO LEATHER CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

AEROLINEAS ARGENTINAS S.A.,

Petitioner,

—v.—

MARO LEATHER CO.,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE TERM, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

Respondent, in opposing the petition for a writ of certiorari, argues that petitioner should have made a fourth request to the New York courts for review of the Appellate Term decision here complained of; however, prior decisions of this Court have held such a requirement to be unreasonable and thus not a jurisdictional requisite under 28 U.S.C. § 1257 (1988). The balance of respondent's arguments either misstate or ignore the relevant precedents. The writ of certiorari should be granted.

CONSTITUTIONAL PROVISIONS INVOLVED BUT NOT PREVIOUSLY QUOTED IN FULL

Article 6, section 3 of the Constitution of the State of New York (McKinney 1987) provides:

§ 3. [Jurisdiction of court of appeals]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decisions of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

(2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(3) As of right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that, upon affirmance, judgment absolute or final order shall be rendered against him.

(4) From a determination of the appellate division of the supreme court in any department, other than a judgment or order which finally determines an action or special proceeding, where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, but in such case the appeal shall bring up for review only the question or questions so certified; and the court of appeals shall certify to the appellate division its determination upon such question or questions.

(5) From an order of the appellate division of the supreme court in any department, in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, other than an order which finally determines such proceeding, where the court of appeals shall allow the same upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it, and without regard to the availability of appeal by stipulation for final order absolute.

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which is not appealable under paragraph (1) of this subdivision where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon ap-

plication (a) to the appellate division, and in case of refusal, to the court of appeals, or (b) directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

(7) No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding where the appeal to the appellate division was from a judgment or other entered in an appeal from another court, including an appellate or special term of the supreme court, unless the construction of the constitution of the state or of the Untied States is directly involved therein, or unless the appellate division of the supreme court shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

(8) The legislature may abolish an appeal to the court of appeals as of right in any or all of the cases or classes of cases specified in paragraph (1) of this subdivision wherein no question involving the construction of the constitution of the state or of the United States is directly involved, provided, however, that appeals in any such case or class of cases shall thereupon be governed by paragraph (6) of this subdivision.

(9) The court of appeals shall adopt and from time to time may amend a rule to permit the court to answer questions of New York law certified to it by the Supreme Court of the United States, a court of appeals of the United States or an appellate court of last resort of another state, which may be determinative of the cause then pending in the certifying court and which in the opinion of the certifying court are not controlled by precedent in the decisions of the courts of New York.

THE WRIT SHOULD BE GRANTED

I. This Court's *Gotthilf* Decision Is No Bar to Certiorari Jurisdiction

Respondent argues that the instant petition should be dismissed upon the sole authority of *Gotthilf v. Sills*, 375 U.S. 79, 84 S. Ct. 187, 11 L. Ed. 2d 159 (1963). In that case, over the dissent of Chief Justice Warren and Justices Douglas and Black, this Court adopted a New York Court of Appeals finding of nonfinality in dismissing an appeal to it from an order granting body execution against petitioner Gotthilf, holding that failure to apply for Appellate Division permission to appeal the constitutional question to the Court of Appeals prevented a possible decision of "the highest court of a State in which a decision could be had" under the then version of 28 U.S.C. § 1257 (1988).

Gotthilf is clearly distinguishable from the instant case. Here there is present a constitutional question—the enforcement of state prejudgment interest rules over a treaty limitation under the Supremacy Clause—and this Court is not bound by the Court of Appeals' finding that a construction of the federal Constitution was not "directly involved" (N.Y. CONST. art. 6, § 3(b)(1)). Moreover, the dissent in *Gotthilf* pointed out that in that case there was

> no suggestion that after the Court of Appeals dismissed the appeal, petitioner should have repaired once more to the Appellate Division for a certificate or in the words of Section 592, 5 (c) of the New York Civil Practice Act "for permission to appeal."

375 U.S. at 83 n., 84 S. Ct. at 189, 11 L. Ed. 2d at 161. But that is the very suggestion now made by respondent in the present case.

While it is true that CPLR § 5602(b)(2)(i) theoretically provides for the Appellate Division's granting of permission

to appeal to the Court of Appeals, in the circumstances of this case, and under the established interpretation by this Court of the requirements of 28 U.S.C. § 1257, such a futile motion is not required.

A brief review of the appellate history of the instant case is called for. The decision now sought to be reviewed was issued by the New York Supreme Court, Appellate Term, First Department, on July 19, 1994 (Appendix to Petition, A-1). Petitioner's timely August 8, 1994 motion to Appellate Term for reargument or permission to appeal to the Appellate Division was denied on October 13, 1994 (A-14). That was the first refusal of appellate review. Then petitioner's timely October 20, 1994 motion to the Appellate Division for permission to appeal from the Appellate Term decision was denied on December 13, 1994 (A-15). That was the second refusal.

Petitioner then timely filed a December 19, 1994 Notice of Appeal as of right to the Court of Appeals on the constitutional ground established in N.Y. CONST. art. 6, § 3(b)(1) (A-16). The Court of Appeals has the power to review appeals *sua sponte* for jurisdiction and in connection with such review on January 3, 1995 the clerk of the court invited comment from the parties (Appendix M, A-40). Petitioner filed a letter-submission on January 10 (Appendix N, A-42), to which respondent answered (Appendix O, A-49) and petitioner replied (Appendix P, A-52). Respondent also made a submission (Appendix Q, A-54) to which petitioner responded (Appendix R, A-58). In this last letter-submission, petitioner alternatively requested (A-60) that if the Court of Appeals were to find itself to lack jurisdiction on the appeal as of right, it should grant leave to appeal under the "interest of substantial justice" standard of N.Y. CONST. art. 6, § 3(b)(6)(b). This the Court in its eventual order (A-18) failed to do. This, then, was the third refusal.

Respondent claims that petitioner should thereafter have sought leave from the Appellate Division to appeal to the Court of Appeals from its own order denying leave to ap-

peal from the same Appellate Term decision.[1] But the standard for any such discretionary leave to appeal is the same as that involved on the three prior refusals of appellate review. *Compare* N.Y. CONST. art. 6, § 3(b)(6) ("Such an appeal shall be allowed when required in the interest of substantial justice.") *with Rosenberg v. Rosenberg*, 24 A.D.2d 26, 27, 263 N.Y.S.2d 586, 588 (1st Dep't 1965) ("[T]he paramount consideration [is] whether the interests of justice call for our review of the particular case.").

Under such circumstances, 28 U.S.C. § 1257 does not require that a further application be made in order for this Court to retain certiorari jurisdiction. In *Minneapolis, St. Paul & Sault Ste. Marie Railway Co. v. Rock*, 279 U.S. 410, 49 S. Ct. 363, 73 L. Ed. 766 (1929), a similar situation arose under Illinois appellate procedure, where the Illinois Supreme Court denied certiorari review to Rock, a railway employee The railway later challenged certiorari jurisdiction because Rock had not thereafter applied to the Illinois intermediate appellate court for a certificate of importance. Under Illinois procedure a state supreme court denial of certiorari was for jurisdictional purposes an affirmance of the result below.[2] This Court held:

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[1]There is some question whether such an order can in any circumstance be reviewed by the Court of Appeals. *See Hunter v. County Clerk of Suffolk County*, 19 N.Y.2d 941, 281 N.Y.S.2d 346, 228 N.E.2d 402 (1967) ("[O]rder denying leave to appeal to the Appellate Division involves a pure question of discretion of the type not reviewable by the Court of Appeals . . . ."); HENRY COHEN & ARTHUR KARGER, THE POWERS OF THE NEW YORK COURT OF APPEALS § 147, at 585 (rev. ed. 1952). Extensive research has found no instance of the Court of Appeals' ever reviewing by any route a case in which an Appellate Division had previously denied leave to appeal to itself from an Appellate Term decision.

[2]The New York Court of Appeals has similarly so held as to the effect of an Appellate Division dismissal of an appeal. *In re Luckenbach*, 303 N.Y. 491, 104 N.E.2d 870 (1952).

> It would be unreasonable to require a defeated party to apply to the judges of the lower court for a certificate of importance and appeal after the Supreme Court had so approved the judgment.
>
> The judgment is reviewable here. "Whenever the highest court of a State by any form of decision affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involves a Federal question, will, upon a proper proceeding, attach."

279 U.S. at 412, 49 S. Ct. at 363, 73 L. Ed. at 766 (citations omitted). To the same effect see *Chesapeake & Ohio Railway Co. v. Mihas*, 280 U.S. 102, 50 S. Ct. 42, 74 L. Ed. 207 (1929).

So here, it would be unreasonable to require a certain fourth denial of state appellate review[3] prior to attachment of this Court's jurisdiction to issue a writ of certiorari under section 1257.

II. *Denby*'s Misreading of *Fothergill*'s Interpretation of the Warsaw Convention Needs Correction by This Court

The Law Lords in *Fothergill v. Monarch Airlines Ltd.*, [1981] A.C. 251 (H.L. 1980), although they differed on such points as the appropriate weight to be given to various guides to interpretation of a treaty, were all agreed as to the issue before them and its resolution: Whether the term "*avarie*" in art. 26(2)—translated in both the British and American versions as "damage"—should be limited to

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[3] As a matter of law, such a motion cannot now timely be brought, and such untimeliness cannot be waived under state procedural law. CPLR §§ 5513(b), 5514(a), (c).

physical damage alone or should include partial nondelivery of the baggage or goods consigned to the airline. All agreed that the broader meaning was the correct one.

Respondent is groundless and wrong in asserting, therefore (Brief in Opposition at 11) that

> it has always been understood that had Mr. Fothergill taken three suitcases with him on that fateful day, and only two of them were delivered, the total non-delivery of the one suitcase would not be "damage" and thus would not require a seven day notice of claim.

The supposed rule of decision that "Damage is damage and loss is loss"[4] does violence to the established legal meaning of the controlling treaty language. So does the making of a distinction in application of the Convention's provisions based on whether or not one or more whole packages is lost by the airline. Neither the Convention nor the tariff speaks in terms of individual cartons or pieces of luggage, but only in general collective terms such as "*des marchandises*" ("the goods") or "the consignment". The only article of the Convention that gives rise to any consequences arising from goods being shipped in more than one package is art. 7, which gives the carrier the right to require the consignor to execute multiple waybills for multiple packages—but such was not done here. No language in the Convention, therefore, can serve as a ground for distinguishing between a loss by an air carrier of a full carton of goods and a loss of half a carton of goods. Yet just such a distinction was made by the *Denby* court. That distinction was just as impermissibly followed by the decision here below.

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[4] *Schwimmer v. Air France*, 87 Misc. 2d 147, 149, 384 N.Y.S.2d 658, 659 (Civ. Ct. 1976) (cited with approval by *Denby v. Seaboard World Airlines, Inc.*, 737 F.2d 172, 186 (2d Cir. 1984)) (and unsuccessfully quoted by losing counsel in *Fothergill*, [1981] A.C. at 264 (argument of counsel)).

Prior to this judicial legislation by the Second Circuit, there was no such "understanding" as respondent alleges. Instead, there has since been only *mis*understanding – misunderstanding which gives the United States an interpretation of a multilateral treaty different from that of the other parties to it. Such misunderstanding can only be corrected by this Court.

III. Affirmance by an Equally Divided Court and Denial of Certiorari Can Constitute No Precedent on the Issue of Prejudgment Interest

Respondent argues (Brief at 14-15) that the three-way conflict between Circuit Courts of Appeal and New York state courts would in effect be resolved by virtue of this Court's denials of certiorari in the present case and in *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.*, 469 U.S. 1186, 105 S. Ct. 951, 83 L. Ed. 2d 959 (1985), or by its affirmance by an equally divided court in *Eastern Air Lines, Inc. v. Mahfoud*, 474 U.S. 213, 106 S. Ct. 586, 88 L. Ed. 2d 522 (1985).

Aside from the fact that such dispositions do not resolve the conflict between the holding below and the Fifth Circuit's decisions relied on by respondent, it is well settled that such dispositions have *absolutely no precedential effect*. *E.g.*, *Brown v. Allen*, 344 U.S. 443, 491, 73 S. Ct. 397, 439, 97 L. Ed. 469, 507 (1953) ("Thirty years ago the Court rather sharply reminded the Bar not to draw strength for lower court opinions from the fact that they were left unreviewed here."); *United States v. Carver*, 260 U.S. 482, 490, 43 S. Ct. 181, 182, 67 L. Ed. 361, 364 (1923) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."); *Neil v. Biggers*, 409 U.S. 188, 192, 93 S. Ct. 375, 378-79, 34 L. Ed. 2d 401, 407 (1972) ("Nor is an affirmance by an equally divided Court entitled to precedential weight."); *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 112, 19 L. Ed. 419, 423 (1868) (affirmance by equally

divided court without opinion "prevents the decision from becoming an authority for other cases of like character").

Therefore, the conflict among the authorities noted below can only be resolved by this Court, and not by any examination of the precedential status quo.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FRANCIS A. MONTBACH
Counsel of Record

PAUL AMBOS

BIGHAM ENGLAR JONES & HOUSTON
Counsel for Petitioner
14 Wall Street
New York, New York 10005
(212) 732-4646

May 3, 1995

APPENDIX M

STATE OF NEW YORK
COURT OF APPEALS

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

January 3, 1995

Bigham Englar Jones & Houston
14 Wall Street, 22nd Floor
New York, New York 10005

Re: Maro Leather Co. v. Aerolineas Argentinas v TWA

Dear Counsel:

The Court has received your 500.2 jurisdictional statement and may examine its subject matter jurisdiction *sua sponte* with respect to whether a substantial constitutional question is directly involved to support an appeal as of right and whether the order appealed from finally determines the action within the meaning of the Constitution.

This communication is without prejudice to any motion any party may wish to make. If you conclude that the order is not appealable as of right, please arrange for the execution of a stipulation consenting to a dismissal of the appeal and transmit that paper to my office. If a stipulation is to be forthcoming, please inform me immediately.

On the other hand, if you wish to persevere in the appeal, you are invited to present to the Court in writing within ten days of this letter's date your comments justifying the retention of subject matter jurisdiction, including references to the record demonstrating that a constitutional question was raised in the court or other forum of original instance. Also please enclose a copy of each brief filed in the Appellate Division, as well as a copy of the Record on Appeal or Appendix filed in that court. Your adversary is likewise afforded the opportunity to comment in writing on the subject matter jurisdiction.

If this *sua sponte* inquiry is terminated by the Court, the Clerk will notify counsel in writing and set a new schedule for normal perfecting of the appeal.

Very truly yours,

Donald M. Sheraw
Donald M. Sheraw

DMS:mec
cc: Donovan Parry Walsh & Repetto

APPENDIX N

BIGHAM ENGLAR JONES & HOUSTON
14 Wall Street
New York, New York 10005-2140

January 10, 1995

Re: Maro Leather Co. v. Aerolineas Argentinas v. Trans World Airlines, Inc.
N.Y.C. Civil Ct., N.Y. County Index No. 48027/1985
Appellate Term, 1st Dep't Calendar No. 93-257
Appellate Division, 1st Dep't Calendar No. M-5609
Our File No. 165306-14

Hon. Donald M. Sheraw, Clerk of the Court
Court of Appeals of the State of New York
20 Eagle Street
Albany, New York 12207

Dear Sir:

I respond to your January 3, 1995 letter inviting comments upon the Court's *sua sponte* review with respect to its subject-matter jurisdiction of the above-referenced appeal. As requested, I enclose copies of the appellate briefs of both sides below, together with a copy of the Appendix below. In addition, I am copying counsel for respondent as well as the Solicitor General, and as requested in my letter of December 23, 1994, I respectfully request an opportunity to respond to any comments they might offer to the Court on this subject-matter.

The jurisdiction of the Court of Appeals is invoked under CPLR 5601(b), which provides:

> (b) Constitutional Grounds. An appeal may be taken to the court of appeals as of right:
>
> 1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

Prior to the decision of Appellate Term below, issues other than that of constitutional construction were advanced by appellant; since that decision, the only issue as to which appellate review was sought has been the constitutional one. While subdivision 2 of CPLR 5601(b) may thus be applicable here, appellant invokes subdivision 1 as more clearly applicable. In addition, if this appeal is allowed to proceed to consideration of the merits, appellant intends to obtain review under CPLR 5501(a)(1) of the prior non-final order of the Appellate Division entered herein on December 20, 1988.

Some background on the nature of the case is necessary. Plaintiff's claim is for partial loss of a shipment of air cargo carried by defendant in international common carriage by air from Buenos Aires to New York (Complaint, Appendix, at A-17). Since both Argentina and the United States are parties to the multilateral Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (commonly known as the "Warsaw Convention"), the shipment and the claim are governed by the Convention. Defendant pleaded defenses based, *inter alia*, on Articles 22 and 26 of the Warsaw Convention (Answer, A-19, A-22). Liability was contested from the outset, and at one point in the litigation the action was dismissed for failure to file a timely notice of claim with the defendant, but that dismissal was later reversed by the Appellate Division, and the matter proceeded to trial, resulting in a finding in favor of plaintiff, upon which the judgment now appealed was founded.

Article 22 of the Warsaw Convention provides in pertinent part:

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at

the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case, the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

. . .

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

49 Stat. at 3019 (U.S. unofficial translation of French official version). Here the gross weight of the undelivered goods was 1,200 kilograms (Notice to Admit, A-738), and the dollar conversion for the Convention's weight limitation is $20.00 per kilogram (*Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 104 S. Ct. 1776, 80 L. Ed. 2d 273 (1984)). Defendant's "liability", then, must be "limited to" $24,000.00, under the explicit terms of the Warsaw Convention.

The value of the missing goods was determined at trial to be $23,024.90 (A-1224). To this the trial judge added "interest at the statutory rate from February 2, 1984" (*id.*). Section 5001 of the New York State Civil Practice Law and Rules provides, in pertinent part:

§ 5001. Interest to verdict, report or decision.

(a) Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

. . .

(c) Specifying date; computing interest. The date from which interest is to be computed shall be specified in the verdict, report or decision. . . . The amount of interest

> shall be computed by the clerk of the court, to the date the verdict was rendered or the report or decision was made, and included in the total sum awarded.

Similarly, CPLR 5002 provides:

> Interest shall be recovered upon the total sum awarded, including interest to verdict, report or decision, in any action, from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment. The amount of interest shall be computed by the clerk of the court and included in the judgment.

Finally, CPLR 5004 provides, during all times relevant to the present action:

> Interest shall be at the rate of nine per centum per annum, except where otherwise provided by statute.

Applying the foregoing state statutes, judgment was entered for the $23,024.90 principal amount of damages found, plus prejudgment interest totaling $17,790.00, plus costs not here contested of $367.50, for a total of $41,182.40 (A-9). This amount is well in excess of the $24,000.00 to which the explicit terms of the Warsaw Convention, as noted above, stipulate that defendant's liability should be limited.

This conflict brings directly to bear the constitutional provision here invoked by defendant. The Supremacy Clause, article VI, clause 2 of the Constitution of the United States of America, provides in pertinent part:

> . . . all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the . . . Laws of any State to the Contrary notwithstanding.

The meaning of this clause is that "if a state measure conflicts with a federal requirement, the state provision must give way." *Swift & Co. v. Wickham*, 382 U.S. 111, 120, 86 S. Ct. 258, 263, 15 L. Ed. 2d 194, 201 (1965). The Warsaw Convention has repeatedly been held to be a treaty within the scope of the Supremacy Clause. *E.g. Berner v. United States*, 2 Misc. 2d 260, 149 N.Y.S.2d 335 (Sup. Ct. N.Y. County), *aff'd*, 3 A.D.2d 9, 157

N.Y.S.2d 884 (1st Dep't 1956), *aff'd*, 3 N.Y.2d 1003, 170 N.Y.S.2d 340, 147 N.E.2d 732 (1957); *Wyman v. Pan American Airways*, 181 Misc. 963, 43 N.Y.S.2d 420 (Sup. Ct. N.Y. County 1943), *aff'd*, 267 A.D. 947, 48 N.Y.S.2d 459 (1st Dep't), *aff'd*, 293 N.Y. 878, 59 N.E.2d 785 (1944), *cert. denied*, 324 U.S. 882, 65 S. Ct. 1029, 89 L. Ed. 1432 (1945). Nevertheless, the courts below here have instead enforced the state law and not enforced the federal treaty, in direct contravention of the constitutional requirement.

Precedents of the Court of Appeals hold that in such a situation a constitutional question is "directly involved":

> [A]ppeal as of right has been sustained from a decision of the Appellate Division which overrules a claim that a state statute is in conflict with a Federal statute or regulation in violation of the Federal Constitution, though it is first necessary to decide an issue of statutory construction—i.e., whether there is such a conflict—in order to resolve the constitutional issue. In such situations the issue of statutory construction necessarily involves the constitutional issue; and the constitutional issue cannot be obviated, and is in fact resolved, by decision of the issue of conflict.

Henry Cohen & Arthur Karger, The Powers of the New York Court of Appeals § 59, at 268-69 (1952) (footnote omitted) (hereinafter cited as "Cohen & Karger") (citing *Harlem Check Cashing Corp. v. Bell*, 296 N.Y. 15, 68 N.E.2d 854 (1946)).

While it is true that the decision of Appellate Term below does not in terms address the Supremacy Clause, it clearly addresses (albeit incorrectly, appellant contends) its substance:

> In awarding prejudgment interest in excess of the Warsaw Convention's total damages limitation, the trial court relied upon the reasoning of Eli Lilly Argentina, S.A. v. Aerolineas Argentinas, 133 Misc.2d 858, emphasizing the compensatory nature of prejudgment interest under New York law (see, CPLR 5001) and the goal of speedy resolution of cargo loss claims. We affirm.

Decision at ii. (The *Eli Lilly* case held that the doctrine of the "law of the forum" would override the terms of the treaty, 133

Misc. 2d at 861, 508 N.Y.S.2d at 867—a holding clearly inconsistent with the Supremacy Clause. But appellant does not intend to argue the merits of this appeal upon this submission.)

To the extent that the courts below relied upon various Fifth Circuit Court of Appeals cases which allowed prejudgment interest, I must point out for purposes of the present review that this minority holding is specifically limited to cases in federal courts (the interest holding being an issue of federal procedural common law), and that the Fifth Circuit expressly refused in *Domangue v. Eastern Air Lines, Inc.*, 722 F.2d 256, 262 (5th Cir. 1984), to allow the Louisiana prejudgment interest statute as such to have precedence over the Warsaw Convention. The decisions of the Second and Seventh Circuits noted below are obviously in accord. *Eli Lilly*, however, was contrary and thus presents directly the Supremacy Clause issue.

The application of the Warsaw Convention as a limitation on damages was, as noted above, raised by defendant in its pleadings. Its supremacy over the conflicting provisions of CPLR 5001 and 5002 were noted by Mr. Edward Sadowsky, counsel for defendant, in argument of this very issue in the trial court:

> I ask The Court to pay [*sic*; probably should be "take"] judicial notice of The Warsaw Convention . . . . The United States is a signatory to this Warsaw Convention and this is the supreme law of the land as a treaty of The United States as ratified by the congress and signed by the president. Whether we like it or not, state courts must abide by this precedent . . . .

(Transcript of Trial, A-1221.[1]) This issue was similarly restated in the Brief of Defendant-Appellant Aerolineas Argentinas at Appellate Term, at 31:

> The Warsaw Convention is a multilateral treaty designed to establish uniform rules governing the content of

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1 This passage was in response to the trial judge's query, "By what authority may I say that The Convention doesn't apply?" (A-1219), thus showing clear recognition of a conflict between the treaty and the CPLR.

> documentation and the procedures and limits of liability for international air carriers and their customers for passenger traffic and air cargo. *Rosman v. Trans World Airlines, Inc.*, 34 N.Y.2d 385, 390-91, 358 N.Y.S.2d 97, 101, 314 N.E.2d 848, 851 (1974). As a treaty, it is the supreme law of the land, of which New York courts must take notice. *Id.* at 392, 358 N.Y.S.2d at 103, 314 N.E.2d at 852. . . .

The passage in the *Rosman* case last cited to is as follows:

> While the [Warsaw Convention] is written in French, it is nevertheless a domestic, not a foreign law. It is the supreme law of the land (U.S. Const., art. VI, cl. 2) of which New York courts are required to take judicial notice (CPLR 4511, subd. [a] Consol. Laws, c. 8).

All subsequent argument on motion practice has similarly involved direct address of the Supremacy Clause issue. The statement of counsel for respondent (letter of John K. McElligott, Esq., dated December 20, 1994) that "this issue has never been presented to the Court before" is simply inaccurate. Moreover, even if the issue had not been explicitly raised before the court of first instance, it would still be preserved for review. Cohen & Karger, *supra*, § 55, at 252.

Finally, it is clear that the order appealed from, refusing review of a final money judgment for which no further proceedings below were contemplated, satisfies the finality requirement of CPLR 5601(b).

Repeating my earlier request in this letter-submission, appellant respectfully requests a reasonable opportunity to respond to any submissions which may be made by respondent or by the Solicitor General as to the jurisdictional issues here involved.

Respectfully submitted,

Bigham Englar Jones & Houston

by Paul Ambos
Paul Ambos

PA:hs

cc: John K. McElligott, Esq.
Hon. Victoria Graffeo, Solicitor General

APPENDIX O

Donovan Parry Walsh & Repetto
Wall Street Plaza
88 Pine Street
New York, New York 10005-1801

January 16, 1995

VIA EXPRESS MAIL
Honorable Donald M. Sheraw
Clerk of the Court
Court of Appeals of the State of New York
20 Eagle Street
Albany, New York 12207

Re: Maro Leather Co. v. Aerolineas Argentinas
v. Trans World Airlines, Inc.
Civil Court Index No.: 48027/85
Appellate Term, 1st Dept. Cal. No.: 93-257
Appellate Division, 1st Dept. Cal. No.: M-5609
Our File No.: 12-85-709

Dear Mr. Sheraw:

This office is in receipt of the January 10, 1995 letter from counsel for defendant-appellant with regard to the Court's *sua sponte* review of subject matter jurisdiction. I request the Court's leave to respond briefly to two points made in this letter.

At page 5 of the letter counsel states, "Precedents of the Court of Appeals hold that in such a situation a constitutional question is 'directly involved' ". Counsel offers this authority for the proposition that where there is a conflict in interpretations of a statute the Court of Appeals has ruled that a constitutional question is directly involved. Yet, the Court of Appeals precedents cited by counsel turn out to be only one, and one which does not support appellant's position. In *Matter of Harlem Check Cashing Corp. v. Bell*, 296 N.Y. 15 (1946), at page 16, wherein is recited the appellant's points on appeal, the appellant argued, "Article 1, section 12, of the Constitution of the State of

New York and section 813-a of the New York Code of Criminal Procedure purporting to legalize such interception and disclosure are violative of the Interstate Commerce Clause of the Federal Constitution." It is thus apparent that there was a direct constitutional challenge to the statute in the check cashing case and not simply a question of interpretation. In this case there never has been a constitutional challenge to CPLR 5001 or CPLR 5002.

Additionally, at pages 5 through 6 of the letter, counsel states, "The *Eli Lilly* case held that the doctrine of the 'law of the forum' would override the terms of the treaty . . . a holding clearly inconsistent with the Supremacy Clause." Yet, a review of the *Eli Lilly* case reveals the exact contrary. In *Eli Lilly* the Court stated, "Article 28 of the Warsaw Convention *may be interpreted* to allow the law of the forum on pre-judgment interest", 133 Misc.2d 858, 508 N.Y.Sup. 867. (Emphasis supplied) It is thus evident that in the *Eli Lilly* case the Court did not find that the law of the forum supersedes the Warsaw Convention, but found that if the treaty is silent with regard to a particular issue that the law of the forum, i.e., pre-judgment interest, may be invoked. Clearly, this was a matter of interpretation. Likewise, in this case, respondent's position is not that CPLR 5001 supersedes the Warsaw Convention, but that the Warsaw Convention is silent as to pre-judgment interest and thus pre-judgment interest is allowable. This is not a question directly involved in the construction of the Constitution of the United States, but only a matter of interpretation of the language of a treaty.

Thus, since no direct constitutional challenge has been raised previously, and since the issue of treaty interpretation is not a constitutional issue, plaintiff-respondent does not believe that subject matter jurisdiction lies and respectfully requests that the matter be dismissed.

Thank you for your attention.

Very truly yours,

Donovan Parry Walsh &
Repetto

By: John K. McElligott
John K. McElligott

JKM/vf
cc:
Bigham Englar Jones & Houston
14 Wall Street
New York, New York 10005
Attention: Paul Ambos, Esq.

Honorable Victoria Graffeo
Solicitor General
State of New York
Department of Law
The Capitol
Albany, New York 12224

APPENDIX P

Bigham Englar Jones & Houston
14 Wall Street
New York, New York 10005-2140

January 18, 1995

Re: Maro Leather Co. v. Aerolineas Argentinas v. Trans World Airlines, Inc.
N.Y.C. Civil Ct., N.Y. County Index No. 48027/1985
Appellate Term, 1st Dep't Calendar No. 93-257
Appellate Division, 1st Dep't Calendar No. M-5609
Our File No. 165306-14

Hon. Donald M. Sheraw
Clerk of the Court
Court of Appeals of the State of New York
20 Eagle Street
Albany, New York 12207

Dear Sir:

Further to my letter of January 10, 1995, appellant respectfully responds to the letter to you from John K. McElligott, counsel for respondent, dated January 16, 1995, in turn responding to my letter of January 10, 1995.

Respondent is still trying to couch this case as a question of interpretation of treaty language, ignoring the authoritative text on Court of Appeals jurisdiction which points out that while a conflict between state and federal law may well be resolved through interpreting statutory language, this does not mean that the existence of the conflict—the foundation for constitutional-question jurisdiction—is nullified.

Moreover, (although this touches the merits of the appeal) it is no response to claim that the Warsaw Convention is "silent as to pre-judgment interest"; the Convention speaks in terms of "liability", as to which prejudgment interest is an element. While such "interpretation" can perhaps be used to justify inclusion of state-law-derived prejudgment interest as an element of damages

in a Warsaw claim *up to the limitation amount*, it cannot support interest above that amount without running afoul of the Supremacy Clause. *Cf. The Limited Stores, Inc. v. Pan American World Airways, Inc.*, 65 Ohio St. 3d 66, 600 N.E.2d 1027 (1992) (allowing prejudgment interest up to Warsaw limitation amount but not beyond) (applying New York CPLR 5001).

As pointed out in my January 13 letter, this Court has long recognized that it is impermissible to sidestep the plain meaning of a law or treaty "under the guise or pretext of interpretation". It must be equally impermissible to sidestep the Supremacy Clause by the same pretext.

Respectfully submitted,

Bigham Englar Jones & Houston

by Paul Ambos
Paul Ambos

PA:hs
cc: John K. McElligott, Esq.
Hon. Victoria Graffeo, Solicitor General

APPENDIX Q

Donovan Parry Walsh & Repetto
Wall Street Plaza
88 Pine Street
New York, New York 10005-1801

January 12, 1995
VIA OVERNIGHT MAIL

Honorable Donald M. Sheraw
Clerk of the Court
Court of Appeals of the State of New York
20 Eagle Street
Albany, New York 12207

Re: Maro Leather Co. v. Aerolineas Argentinas
v. Trans World Airlines, Inc.
Civil Court Index No.: 48027/85
Appellate Term, 1st Dept. Cal. No.: 93-257
Appellate Division, 1st Dept. Cal. No.: M-5609
Our File No.: 12-85-709

Dear Sirs:

This office is in receipt of the Court's letter dated January 3, 1995, requesting commentary from the parties with regard to the question of subject matter jurisdiction of the instant appeal pursuant to CPLR 5601(b)1.

This office represents the Plaintiff-Respondent, Maro Leather Co., in the captioned appeal. By prior correspondence to the Clerk's office dated December 20, 1994, we requested the opportunity to respond to such jurisdictional statement when the Court conducts its *sua sponte* review. A copy of our December 20, 1994 letter is attached hereto. As stated in that letter, respondent does not believe that subject matter jurisdiction lies, and thus believe the appeal should be dismissed.

We note that in Appellant's statement pursuant to Rule 500.2 there is still some ambiguity as to what Appellant claims is the issue before the Court which directly involves "the construc-

tion of the Constitution of the state or of the United States", and thus gives the Court jurisdiction under C.P.L.R. § 5601(b)1. Thus, we are at some disadvantage in addressing the issues, but nevertheless shall respond to the Court's inquiry based on the contents of the Rule 500.2 statement.

In paragraph 9 of the Statement Defendant-Appellant "asserts that sections 5001(a) and 5002 of the Civil Practice Laws and Rules, as here applied, are unconstitutional". I have reviewed the Record on Appeal, as well as the brief submitted by Appellant to Appellate Term, and the motion papers submitted to both requests for leave to appeal. I have found nothing in the record before Civil Court, Appellate Term or the Appellate Division where Appellant argued in any way that C.P.L.R. 5501(a) or 5502 were unconstitutional either *in toto* or as applied in this case. If this is appellant's position, it is evident that this issue is being raised for the first time in order to invoke the Court's mandatory jurisdiction under C.P.L.R. 5601(b)1. The Court of Appeals has noted that when a constitutional issue is raised for the first time on appeal (in this case, for the first time on appeal to the Court of Appeals, after the matter has been before two appellate tribunals) the "issue is therefore not preserved for our review and the appeal as right must be dismissed on the ground that no substantial constitutional question is directly involved". *Matter of Shannon B.*, 70 N.Y.2d 458, 462, 522 N.Y. Supp. 2d 488, 490 (1987). Thus, due to the failure of defendant to challenge the constitutionality of the applicable statutes in any previous forum, the issue is not preserved for this Court's review and subject matter jurisdiction does not lie. For the Court's review, we again enclose a copy of the Point headings in appellant's brief at Appellate Term, as well as the Appellate Term decision. As the Court can observe, the constitutionality of the statutes was neither challenged by appellant, nor addressed in Appellate Term's decision.

At paragraph 7 of the Rule 500.2 Statement, Appellant apparently attempts to create a constitutional issue by arguing that the absence of language in the Warsaw Convention regarding pre-judgment interest involves the construction of Article 5,

Clause 2 of the Constitution of the United States, the Supremacy Clause. Yet, the interpretation of provisions of the Warsaw Convention do not create an issue which directly involves the construction of the Constitution of the United States. Interpretation of the Treaty, just like interpretation of any act or [*sic*] Congress, is solely a matter of intention of the drafters of the Treaty and not of the Constitution of the United States. While the Supremacy Clause may make the Warsaw Convention the law of the land with regard to those issues to which the Convention is addressed, questions regarding the interpretation of the Warsaw Convention do not involve the construction of the Constitution of the United States. any more than a question regarding the interpretation of such statutes as the Interstate Commerce Act or the Jones Act, issues frequently addressed in State Courts, would involve construction of the Supremacy Clause. For instance, in *Dalziel v. Oregon-Washington Railroad and Navigation Company*, 248 N.Y. 569 (1928), the Court of Appeals dismissed an appeal from a judgment of the First Department (219 App. Div. 394 (1927)), which had interpreted provisions of the Carmack Amendment to the Interstate Commerce Act. Implicit in the dismissals was the absence of subject matter jurisdiction.

The Court of Appeals has addressed the distinction between an appeal concerning the interpretation of a statute and its constitutionality, and has found that in the former case there is no constitutional issue:

> There is no merit in the appellant's assertion and argument that this proceeding directly involved the construction of the Constitution of the state. He avers that he is held in imprisonment by virtue of a sentence and judgment which the court had not the power to render and, therefore, are void. Whether or not the Court had the power is determinable only through the interpreting of statues. The meaning and not the validity of the statutes is involved. In a certain sense, perhaps, each enforcement of a statute by a Court involves its constitutionality or the construction of the Constitution of the state. That sense, however, was not within the legislative mind or intention in enacting the present restric-

tion of our jurisdiction. *An appeal, upon the ground the Appellant here asserts, must present to us directly and primarily an issue determinable only by our construction of the Constitution of the state or of the United States. People Ex Rel Curtis v. Kidney*, 225 N.Y. 299, 304-305 (1919). (Emphasis supplied) See, also, *People ex Rel Ryan v. Lynch*, 262 N.Y. 1, 4 (1933).

Thus, where, as in this case, when all that is involved is the interpretation of the provisions of the Warsaw Convention there is no direct constitutional issue involved such as to permit jurisdiction under C.P.L.R. 5601(b)(1).

Consequently, we respectfully request that the appeal be dismissed, so that plaintiff may enforce a judgment currently amounting to $40,814.90 (with additional interest to be computed), which it has sought to obtain for nine years.

Thank you for your attention.

Very truly yours,

Donovan Parry Walsh &
Repetto

By: John K. McElligott
John K. McElligott

JKM/vf
cc: w/o Encs.
Bigham Englar Jones & Houston
14 Wall Street
New York, New York 10005
Attention: Paul Ambos, Esq.

APPENDIX R

Bigham Englar Jones & Houston
14 Wall Street
New York, New York 10005-2140

January 13, 1995

Re: Maro Leather Co. v. Aerolineas Argentinas v. Trans World Airlines, Inc.
N.Y.C. Civil Ct., N.Y. County Index No. 48027/1985
Appellate Term, 1st Dep't Calendar No. 93-257
Appellate Division, 1st Dep't Calendar No. M-5609
Our File No. 165306-14

Hon. Donald M. Sheraw
Clerk of the Court
Court of Appeals of the State of New York
20 Eagle Street
Albany, New York 12207

Dear Sir:

Further to my letter of January 10, 1995, appellant respectfully responds to the letter to you from John K. McElligott, counsel for respondent, dated January 12, 1995, in which he offers comments on behalf of respondent in connection with the Court's *sua sponte* review with respect to jurisdiction of the above-referenced appeal.

Opposing counsel again relies on copies of point headings in briefs and ignores the fact that the argument by appellant in the court of first instance invoked the very language of the Supremacy Clause to insist that the clear language of the Warsaw Convention be given priority over the prejudgment-interest provisions of CPLR 5001 and 5002. That argument was denied by decisions of both the Civil Court and the Appellate Term, each specifically invoking *Eli Lilly Argentina, S.A. v. Aerolineas Argentinas*, 133 Misc. 2d 858, 861, 508 N.Y.S.2d 865, 867 (N.Y. City Civ. Ct. 1986), a case which held that CPLR prejudgment-interest provisions (as the "law of the forum") take priority over the Warsaw Convention.

This direct violation of the Supremacy Clause thus, as shown by the precedents cited in my January 10 letter, requires the conclusion that the constitutional question is "directly involved".

Hence counsel's citation of *Matter of Shannon B.*, 70 N.Y.2d 458, 522 N.Y.S.2d 488, 517 N.E.2d 203 (1987), is irrelevant. Likewise irrelevant is reliance on such cases as *Dalziel v. Oregon-Washington R.R. & Navigation Co.*, 248 N.Y. 569, 162 N.E. 528 (1928), in which no conflict between a federal statutory or treaty provision and a state law was presented.

Respondent repeatedly tries to characterize this case as not presenting a Supremacy-Clause conflict between a federal treaty and a state statute (although Mr. McElligot's letter of December 20, 1994 appears to concede that this conflict in fact exists), but rather merely a dispute over "statutory construction" of the Warsaw Convention. But this does not solve the problem. The mere fact that statutory construction may be involved in resolving issues does not mean that there is no Supremacy-Clause conflict; on the contrary, in the circumstances of this case the fact of jurisdiction is supported by the existence of this question. As pointed out in my earlier letter,

> appeal as of right has been sustained from a decision of the Appellate Division which overrules a claim that a state statute is in conflict with a Federal statute or regulation in violation of the Federal Constitution, though it is first necessary to decide an issue of statutory construction—i.e., whether there is such a conflict—in order to resolve the constitutional issue. In such situations the issue of statutory construction necessarily involves the constitutional issue; and the constitutional issue cannot be obviated, and is in fact resolved, by decision of the issue of conflict.

Henry Cohen & Arthur Karger, The Powers of the New York Court of Appeals § 59, at 268-69 (1952) (footnote omitted).

The Warsaw Convention is clear: "the liability of the carrier shall be limited to [here, $24,000.00]". It does not state that "liability . . . shall be limited to [$24,000.00] *unless some New York statute provides otherwise*". When the words of a statute or treaty

> have a definite and precise meaning, such meaning cannot be extended or restricted by conjecture, or under the guise or pretext of interpretation. It is not allowable to interpret that which has no need of interpretation.

Mushlitt v. Silverman, 50 N.Y. 360, 361 (1872), *accord Dep't of Welfare v. Siebel*, 6 N.Y.2d 536, 543, 190 N.Y.S.2d 683, 689, 161 N.E.2d 1 (1959); *McCluskey v. Cromwell*, 11 N.Y. 593, 601-02 (1854). To uphold the unsupportable decisions below would itself be a denial of due process, which would also support jurisdiction in the Court of Appeals under the rule of *Valz v. Sheepshead Bay Bungalow Corp.*, 249 N.Y. 122, 163 N.E. 124, *cert. denied*, 278 U.S. 647, 49 S. Ct. 82, 73 L. Ed. 560 (1928). Such convoluted reasoning should not, however, be necessary to support jurisdiction here.

For the foregoing reasons, appellant respectfully submits that this Court has jurisdiction to consider this appeal as of right pursuant to CPLR 5601(b). Should this Court determine, however, that no appeal as of right lies, appellant respectfully requests leave pursuant to CPLR 5520 to request that this Court, in light of the significance of the issues involved, and in the interest of substantial justice under art. 6. § 3 of the N.Y. Constitution, allow leave to appeal by permission.

Repeating my earlier request, appellant respectfully requests a reasonable opportunity to respond to any further submissions which may be made by respondent or by the Solicitor General as to the jurisdictional issues here involved.

Respectfully submitted,

Bigham Englar Jones & Houston

by Paul Ambos
Paul Ambos

PA:hs

cc: John K. McElligott, Esq.
Hon. Victoria Graffeo, Solicitor General